

IN THE SUPREME COURT OF MISSOURI

JOHN DOE (TONY TWIST),)	
)	
Appellant,)	
)	
vs.)	Supreme Court No. SC84856
)	
TCI CABLEVISION, etc., et al.,)	
)	
Respondents.)	

**APPEAL FROM THE CIRCUIT COURT OF
CITY OF ST. LOUIS
STATE OF MISSOURI**

**HONORABLE ROBERT H. DIERKER
CIRCUIT JUDGE
DIVISION 3**

APPELLANT'S SUBSTITUTE BRIEF

Respectfully submitted,

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JURISDICTIONAL STATEMENT

On November 26, 2002 this Court sustained Appellant's Application for Transfer after opinion by the Missouri Court of Appeals Eastern District. Art. V Sec. 10 Const. Mo. This court has jurisdiction.

PROCEDURAL HISTORY

Tony Twist (hereafter Appellant or Tony Twist) sued Respondent Todd McFarlane, the creator of a publication named "Spawn", and other Respondent corporations owned and controlled by McFarlane, all of whom directly participated in the use of Appellant's name and identity. They are Todd McFarlane ("McFarlane"), Todd McFarlane Productions, Inc. ("TMP"); TMP International, Inc. ("TMP International"); Image Comics, Inc. ("Image"); and Todd McFarlane Entertainment, Inc. ("McFarlane Entertainment"). The verdict and Judgment was against these Respondents/Defendants, (hereafter referred to as a group as "Respondents").

The basis for the suit was the use of Appellant's name as the name of a principle character in the Spawn comic and related products distributed nationally and internationally, without Appellant's consent, and to the advantage of Respondents or to the injury of Appellant.

Appellant also sought an injunction against the further use of Appellant's name and identity. The suit was in six counts. The trial court sustained a Motion to Dismiss or Summary Judgment for the Defendants on Count II (Defamation) and Count V (Civil Conspiracy). Appellant submitted Count I, Wrongful Appropriation of Appellant's Name to the jury, and Count VI Injunctive Relief to the court. Appellant chose not to submit Counts III (Unjust Enrichment) and Count IV (Misappropriation). The Wrongful Appropriation of Name count was tried to a jury, with the evidence being received concurrently by the Court

on the injunction count. (LF 1387, 1388.) All defamation claims and claims for emotional distress were dismissed by the trial court (JNOV A2).

The jury returned a unanimous verdict against the Respondents for \$24,500,000.00, upon which the court entered judgment. (LF 1287-1290). Respondents filed a Motion for Judgment Notwithstanding the Verdict (JNOV) and in the alternative for remittitur or new trial.

On October 31, 2000, the trial court entered its Memorandum, Order and Judgment. (the "Judgment"). The court's Judgment held Appellant failed to make a submissible case on Appellant's claim for Wrongful Appropriation of name; denied Appellant injunctive relief, and alternatively sustained Respondents' Motion for New Trial, and denied Respondents' Request for Remittitur (LF 1404-1406, A19-21).

The trial court errors here asserted occurred in the trial court's October 31, 2000 Judgment granting JNOV and other relief to Respondents. The errors asserted here were the trial court's post-trial action in erroneously adding additional elements to the tort of wrongful appropriation of name or likeness, contrary to established Missouri law, and then, using those added elements in holding that Appellant's evidence was insufficient to make a submissible case, resulting in the JNOV. (LF 1386-1406; Appendix A1-A21). A copy of the trial court's "Memorandum, Order & Judgment" of October 31, 2000 (JNOV) is attached hereto as part of the Appendix, pages A1-A21, Appendix to this Brief for the ready reference of the Judges. The trial court also erred in its denial of Appellant's request for injunctive relief and granting a new trial.

The Court of Appeals' opinion ("slip opinion") is attached in the appendix at pages A41 - A75. Both the trial court's judgment and the slip opinion were principally based on the view that appropriation of name or identity, or right of publicity claims, requires a plaintiff to satisfy the U.S. Const. Amend. I requirements of malice as set out in *New York Times v. Sullivan*, 376 U.S. 254 (1964) and similar cases. This Court ordered transfer.

After judgment for Appellant, the court entered judgment notwithstanding the verdict (JNOV), holding Appellant failed to make a submissible case. Therefore, this Court will review the evidence in the light most favorable to the verdict, and accept such evidence as true, giving Appellant the benefit of all reasonable inferences drawn therefrom, and disregard Respondents' evidence except insofar as it aids Appellant's case. *Dockery v. Mannisi*, 636 S.W.2d 372, 376 (Mo. App. E.D. 1982); *Layton, et al. v. Baris*, 43 S.3rd 390 (Mo. App. E.D. 2001). Therefore, the facts will be stated in the light required by *Dockery v. Mannisi* and *Layton v. Baris, supra*.

Citation to evidence in the Transcript will be cited as: "(T_____)". The evidence introduced by video or written deposition was not transcribed into the principal trial transcript. Those depositions have been filed in this court as part of the record on this appeal, and constitute a part of the evidence. By stipulation, those portions of the deposition which were not read to the jury have been marked out in the deposition transcripts. Citations to deposition testimony will name the deponent and the deposition page number, e.g.: (Phillips ____). Appellant read into evidence portions of the deposition of Respondent McFarlane, which consisted of two volumes, and McFarlane also testified in

the defense of this case. Citation to the deposition testimony of McFarlane will be cited as "(McFarlane, Vol. ____)". A principal issue on this appeal is whether Appellant made a submissible case, discussion of that issue requires a rather extensive review of the evidence. The following "Concise Statement of Facts" is brief in order to give an overview of the case.

Appellant follows the "Concise Statement of Facts" with a summary of the relevant trial evidence. The summary of the evidence is grouped in a manner to explain what Spawn products are, who the Appellant and Respondents are and the evidence on each count of Appellant's causes of action for wrongful appropriation of name and identity and injunctive relief.

CONCISE STATEMENT OF FACTS

The Appellant, Tony Twist, sued Respondents for the appropriation of his name without his consent to the advantage of Respondents. The Court of Appeals, noting that Appellant is a sports celebrity, said that cause of action is more appropriately styled a "right of publicity" case, and pointed out the elements are essentially the same.

Appellant had been a professional hockey player in the National Hockey League since 1988, playing for the St. Louis Blues, the Quebec Nordiques and then back to the Blues. (T 315, 318). His playing career ended in mid 1999 consequent to injuries sustained in a motorcycle accident. (T 315, 318). He was a renowned "enforcer," which means his job was to protect goal scoring teammates from injury by opponents, (T 321) and was among the top five enforcers in the NHL. (McFarlane, Vol. 1, p. 243). Beginning in

1991, when he played for the Quebec Nordiques and throughout his playing career, he received local and national notoriety in TV, radio, newspapers and was featured in numerous national and local magazines. (T 323-329).

Appellant began preparing for life after hockey in 1991, while with the Quebec Nordiques, by taking training in presenting himself appropriately on cameras and conducting interviews (T 344) as a sports commentator and endorser of products. (T 343). During his hockey career he marketed himself as an endorser of products (T 351) and had an athlete endorsement contract with Met-RX, a sports food supplement company (T 349) as well as endorsing several other products. (T 348-349). In September 1999, Appellant was offered a contract to endorse the sports nutrition products of Experimental Applied Sciences (EAS) at \$100,000.00 per year. (T 388; Phillips 8, 9). That offer was withdrawn by EAS because of the negative image Appellant's name and identity had acquired by the non-consensual use of his name in Spawn products. (Phillips 17).

Respondent Todd McFarlane is the creator and author of the Spawn comic book, and other related comic books. (McFarlane Vol. I, page 27). He created several corporations for the purpose of marketing and advertising Spawn, other comic books and Spawn products. (T 28, 35, 56-57). He is President or CEO of Respondents Todd McFarlane Productions, Inc.; TMP International, Inc. and Image Comics, Inc., and controls Todd McFarlane Entertainment, Inc. (McFarlane Vol. I, pages 7, 27-28 and 79; Fitzgerald 7).

In December 1992, McFarlane named the comic book character "Tony Twist" and that character began to appear in comic books "Spawn"; "Violator"; and "Curse of Spawn".

(McFarlane Vol. I, page 27 and Exhibits 16, 17 and 18). McFarlane knew Appellant was a hockey player with the Quebec Nordiques and that Appellant was well known to hockey fans. (T 851). In 1997, McFarlane used Appellant's name in an HBO Spawn animated series, knowing Appellant was a professional athlete; had a fan base (T 851); and was among one of the top five enforcers in the NHL (McFarlane, Vol. 1, p. 243). (McFarlane, Vol. 1, p. 240). McFarlane was a huge hockey fan and part owner of the Edmonton Oilers, an NHL team. (T 889).

McFarlane supplied the information to Wizard publication for a Wizard Spawn Special Edition published in 1996. (Beatty, 27, 28 and 32). McFarlane told Wizard that the character "Tony Twist" was based on the real life person - Appellant Tony Twist. (Beatty, 28).

In the Wizard Spawn Special Edition, McFarlane stated he used the names of live people as the characters in Spawn. (Exhibit 1 at page 28; Appendix at A37-40). The biography of "Tony Twist" shows a picture of the character "Tony Twist" and a photo of Appellant in his hockey uniform. (Exhibit 1, Appendix at A38). It is captioned Anthony "Tony Twist" Twistelli, and states "Real Life Persona: **Tony Twist; NHL St. Louis Blues Right Winger.** The mafia don. . . **is named for former Quebec Nordiques Hockey Player Tony Twist, now a renowned enforcer for the St. Louis Blues of the National Hockey League.**" (Exhibit 1; Appendix at A38) (emphasis added).

A part of Exhibit 1 at A35-40 is titled "Spawning Ground". It is part of the Wizard Spawn Special Edition - Wizard Spawn Tribute. Respondent's comic book – Spawn – also

contains a section, separate from the comic strip, that McFarlane titled "Spawning Ground," and that one is McFarlane's letters publication where he responds to fan mail. When we refer to McFarlane responses to fan letters, the reference is to McFarlane's responses in Respondent's book – Spawn, and not to Exhibit 1 which appears in part at A35-40.

In issue 24 published in September 1994, McFarlane wrote in response to a fan letter, "Whenever I choose a name I try to have a little bit of play on it. . .I am a big hockey fan, and a lot of my characters have been named after current NHL hockey players. For example, Antonio Twistelli, a/k/a Tony Twist, is actually the name of a hockey player of the Quebec Nordiques. . ." (Group Exhibit 16, Issue 24).

In issue 20, published November 1994, a hockey and Spawn fan wrote to McFarlane saying, "Is it just me, or are there a lot of Quebec Nordiques in your stories?" McFarlane answered, "As a self proclaimed hockey fanatic you are absolutely correct in noticing hockey players' names in my book. . .Let's make a checklist of some of the names I've used so far: . . .Tony Twist. . .you will continue to see current or past hockey players' names in my books. . ." (Exhibit 16, Issue 20).

McFarlane knew Appellant had a fan base (T 851). Appellant had developed a substantial fan base consisting of hockey fans and children. (T 131-132). Respondents marketed Spawn and Spawn products specifically to hockey fans and children. (T 133-135). Respondents cross marketed their Spawn products consisting of comic books, action figures, hockey pucks, toy Zamboni machines, clothing and others, all bearing the Spawn

logo, so that each item assisted in the sale of the others. (McFarlane Vol. I, pages 97-100; Exhibit 39).

McFarlane's intent in using comic books with Appellant's name in them was to promote the sale of Spawn toys and add value to them. (T 762). Respondents' internal documents disclosed this marketing scheme would reach no less than 14.55 million people within a 4-6 month period. (Exhibit 39).

Respondents' trademarked their use of Appellant's name, which means Respondents claimed an ownership of the "Tony Twist" character and that it has value to Respondents. (Cunningham, 108-110).

The story lines of "Spawn, "Violator" and "Curse of Spawn", “Violator” and “Curse of Spawn” were spin-off comic book series, contained kidnappings, killings, kids shooting classmates, priests and parents, and policeman and ambulance personnel raping and killing an innocent woman, and negative and inappropriate behavior throughout the comic books and the HBO animated series. (T 136-138). This portrayal had a negative effect on Appellant's attractiveness as an endorser of products or services to companies. (T 137), because of Respondent's associations of Appellant's identity with this type of product. McFarlane knew those products were offensive to segments of society. (T 854-856) Ex. 23 (Interview at end of HBO Spawn Video played to the jury). McFarlane also knew that prior to using Appellant's name that a source of revenue for athletes was endorsements. (McFarlane, Vol. II, 169).

Appellant was offered an athlete's endorsement contract by EAS in September 1999 at \$100,000.00 per year by Sean Phillips, its executive vice president. (Phillips, 8 and 9). After viewing the Spawn video and seeing Spawn Wizard Tribute, EAS withdrew the offer. (Phillips, 14). Phillips withdrew the offer solely because of "the negative connotations" that Appellant's association with Spawn would have on EAS products. (Phillips 17).

Appellant's expert, Dr. Till, concluded that the fair market value for the use of Appellant's name is 15% of the revenues of Spawn products in which his name was used, (T 136), and 9% of the revenues of Spawn products in which his name was not directly used, because the use of Appellant's name early on in Spawn gave the Spawn franchise momentum and interest. (T 156-158). Appellant's expert Rocky Arceneaux concluded that the fair market value for the use of Appellant's name was 20% of the revenues of all Spawn products. (Arceneaux 25). He determined that it would normally be 15% but that an additional 5% was due to the negative impact on the value of Appellant's name due to his association with Spawn products. (Arceneaux 57-58).

Respondents' gross revenues for Spawn products only, up to a point shortly before trial, were \$122,708,261. (T 551; Exhibit 218).

The jury wrote on the verdict form that their \$24.5 million damage award was arrived at by taking 15% of the revenues, plus 5% for the negative impact on Appellant. (LF 1288). The trial court recognized Respondents were continuing and would continue to use Appellant's name (Appendix at A7-13; LF 1392-1398), but denied the injunction sought by Count VI.

SUMMARY OF EVIDENCE

What are Spawn Products

The original Spawn product was a comic book series titled "Spawn". (Exhibit 16). Spawn was first published June 2, 1992. (T 652). It is published monthly. (Exhibit 16). To trial date, over 90 issues of the Spawn comic book had been published. (Exhibit 16). Other comic book series have been spun-off from the Spawn story-line. They include "Curse of Spawn" and "Violator" among others. (Exhibits 17 and 18). Over 100 million copies of Spawn comic books have been sold worldwide. (T151).

After the Spawn comic book series began, Respondents either produced or licensed other products based on the comic book series. These include action figures, clothes with the Spawn logo, Spawn hockey jerseys, Spawn hockey pucks and toy ice cleaning ("Zamboni") machines with the Spawn logo. (McFarlane, Vol. II, 16-18; T 787). A Hollywood, live-action motion picture was made based on the Spawn storyline. (McFarlane, Vol. I, 57-58). Respondents either directly produced these products or licensed them. (Exhibit 39), and were licensed to others, Respondents maintained creative control over the products. (T 57).

In 1994, Time Warner Entertainment Company, L.P., through its division Home Box Office ("HBO"), contracted with Respondents to produce and broadcast an animated series based on the Spawn storyline. (McFarlane, Vol. I, 55-56; Exhibit 26). Respondents licensed the rights to produce the series to HBO. (Exhibit 26). HBO broadcast the HBO Spawn animated series in 1998 and 1999. (Exhibit 165). McFarlane admitted the HBO

Spawn animated series included the important characters from the Spawn comic book. (T 776-779). "Tony Twist" was one of the principal characters in the HBO Spawn animated series. (Exhibit 23).

Episodes were repeatedly rebroadcast up through the trial. (Exhibit 165). The HBO Spawn video was converted to video, DVD and laser disc format and sold and rented to the public. (McFarlane, Vol. 1, 46-47 and 48-49; Exhibits 23, 24 and 25).

Spawn comic books and the HBO Spawn animated series included graphic depictions of violence and both heterosexual and homosexual sex acts. (Exhibits 16 and 23). Specifically, the HBO Spawn animated series included depictions of extreme violence, perversion and graphic depictions of sex, urination and masturbation. (Exhibit 23.) The character "Tony Twist" is portrayed in the comic books and Spawn HBO animated series as ordering murders, having sex with prostitutes and kidnaping children. (Exhibit 16, Issues 7, 21-25; Exhibit 17, Issues 17 and 18; Exhibit 23). Issues of the comic book graphically depict and glorify mass murders and shootings by children of their parents and siblings in the home, congregations and priests in church and classmates in school. (Exhibits 16 and 17). Other issues graphically portray the rape of women by police officers, ambulance drivers and others. (Exhibits 16 and 17). The character "Tony Twist" is the principle villain who commits or authorizes many of the atrocious violent acts.

Who is the Appellant

The Appellant Tony Twist, age 33 resides in St. Louis, Missouri. He began playing hockey at age 5 and was drafted by the Junior Hockey League, which is a Canadian league

and the road to the National Hockey League (NHL). (T 311, 312, 314). The St. Louis Blues drafted Appellant in 1988 and he was initially assigned to the Peoria Rivermen—a Blues developmental team in Peoria, Illinois, where he played the 1988 and 1989 seasons. (T316). During those seasons he played 28 games for the Blues in the NHL. (T 316). He was traded to the Quebec Nordiques in February 1991, and played 3½ years there and then returned to the Blues, and played the remainder of his career there until it ended in the summer of 1999 as a result of injuries sustained in a motorcycle accident. (T 315, 317-318).

Appellant's role on the ice was an "enforcer", who protected the goal scoring players from opponents. (T 321-322). He was one of the top five "enforcers" in the NHL. (McFarlane Vol., 1 p. 243), and in that role he received local and national notoriety in TV, radio and newspapers, and was featured in numerous national and local magazines. (T 323-329). He became widely known for his charitable activities for children. (T 333-336). Appellant did charity functions for children in hospitals, (T 336), and lead the Iron Horse Motorcycle Tour for the Head First Foundation, an organization which promotes the use of helmets by children. (T 335-339 and Exhibit 204). Appellant also participated in activities specifically directed at decreasing violence, especially gun violence, in our schools. (T341-343 and Exhibit 207). Finally, Appellant spoke to over 15,000 Boy Scouts at an event in Forest Park. (T334). These are only some of the children's charities mentioned in the evidence. For others, see Exhibits 197-202 and 204-207.

Appellant devoted much time and effort to creating a positive image for himself in the community and to increase his value as an endorser of products. While in Quebec, he employed a private coach to enhance his performance in on air interviews. (T 343-344). Appellant spent considerable time and effort giving interviews and appearing on television and radio to increase his visibility and value. (T 350-351).

Beginning in 1991, when with the Quebec Nordiques, and continuing through his career, he appeared on TV and radio thousands of times and in virtually all of the 26 NHL cities, (T 323-325), and hosted "The Tony Twist Show" for two years on Fox2 TV channel in St. Louis. (T 344-345). He achieved a national celebrity status and fan base (Exhibits 197, 198, 199, 200, 201; T 501).

In 1991, Twist began preparing for life after hockey. (T 343-344). He took training in presenting himself appropriately on camera and conducting interviews, etc. (T 344), as he planned on being a sports commentator and endorser of products. (T 343). During his hockey career, he marketed himself as an endorser of products, (T 349-351), and had an athletic endorsement contract with Met-RX, a sports food supplement company. (T 349), as well as endorsing other products at sports shops and card stores including Granger Tools; No Fear (athletic clothes); Dillards, Famous Barr; Wal-Mart and others (T 347-351). Appellant was compensated for his endorsements. (T 347, 348). In September 1999, Twist was offered a contract to endorse the sports nutrition products of Experimental Applied Sciences (EAS) at \$100,000.00 per year. (T 388; Phillips 8, 9).

That offer was withdrawn by EAS solely because of “the negative connotation” that Appellant’s association with Spawn would have on EAS products. (Philips 17).

Who are Respondents

The Respondents are: Todd McFarlane; Todd McFarlane Productions, Inc.; TMP International, Inc.; Image Comics; and Todd McFarlane Entertainment, Inc. and as a group will be referred to as "Respondents".

Respondent **Todd McFarlane** created the Spawn comic book. (T 649, McFarlane Vol. I at page 27). McFarlane is a Canadian national and huge hockey fan. McFarlane personally chose Appellant Tony Twist's name for the character by the same name in various Spawn Products. (T 797). He is the **president** of Respondent Todd McFarlane Productions, Inc., (T 623), CEO of Respondent TMP International, Inc., (McFarlane Vol. I, page 79-80), and president of Respondent Image Comics, Inc., McFarlane Vol. I Page 27-28). McFarlane is the sole owner of Respondent TMP International, Inc. (McFarlane Vol. I, pages 79 and 80). McFarlane and his wife, Wanda Kolomyjec, each owns 50 percent of Respondent Todd McFarlane Productions, Inc. (McFarlane Vol. I, pages 7-8). McFarlane owns 90 percent of Respondent Todd McFarlane Entertainment, Inc. (T 870). McFarlane is an owner of Respondent Image Comics, Inc. (T 729).

Respondent **Todd McFarlane Productions, Inc.** ("TMP") is an Arizona corporation. (McFarlane, Vol. I, 7). Up until 1998, it held the licenses for all Spawn Products. It oversees and effectuates the creation of each Spawn comic book and the various other Spawn related titles such as Curse of Spawn, Violator, Angela, etc.

(McFarlane Vol. I 7-8, 15-16). It employs the writers, artists and creative staff that create Spawn comics. (McFarlane Vol. I 22). After it was sued by Appellant Tony Twist, TMP transferred the control of licensing television, cable and motion picture rights for Spawn to the newly created Todd McFarlane Entertainment, Inc. (Fitzgerald 16-17).

Respondent **TMP International, Inc.** ("TMP International or TMPI") is a corporation with its principal place of business in Michigan. (T 694). Using a license from TMP, it designs, creates and produces toys and action figures based on Spawn characters and the Spawn story line. (T 694). Its toys and action figures are sold nationally and internationally. (T 694).

Respondent **Todd McFarlane Entertainment, Inc.** is a California corporation. It was created in 1998 after the other Respondents were sued by Appellant. After its creation, it held the rights to license, previously held by Respondent TMP, and participate in the creative process of television, cable and motion pictures projects involving Spawn. (Fitzgerald 6-7). These licenses included the character Tony Twist, and the translation of the animated series into home viewing format (VHS, DVD, laser disc, etc.) for sale and rental. (Exhibits 23, 24, 25).

Respondent **Image Comics, Inc.** ("Image") is a California corporation. It was formed by McFarlane for Spawn, after McFarlane quit Marvel Comics. (Plaintiffs Exhibit 1, p. 5) Image Comics solicits, markets, advertises, prints, distributes and collects funds for all Spawn comics. (McFarlane, Vol. 1, 28). Image receives, reviews, and typesets the "letters to the editor" section titled "The Spawning Ground" of each comic book.

(McFarlane, Vol. 1, 172-174). Image also handles the marketing of the individual editions of the comic to comic book retailers. (T 59). Image drafts a solicitation for the comic book which is then published in a national publication, called *Previews*, which goes to comic book retailers to assist them in making their ordering decisions. (T 60).

Respondents Intentionally Used Appellant Tony Twist's Name And Identity

Respondent Todd McFarlane is the creator, author and artist of Spawn and related comics—Curse of Spawn and Violator. (T 649). McFarlane first named the character "Tony Twist" in December 1992. (T 797). That character first appeared in Issue 6. (T 653). Appellant's name first appeared as Antonio Twist in Issue 7, published January 1993. (T 653). After McFarlane first came up with the name "Tony Twist", he expanded it into Antonio Twistelli (T 810-811), but, "Tony Twist" was the key name for the Spawn character. (T 655).

Each issue of Spawn contains a section called "Spawning Ground" in which fan letters written to McFarlane are published, and he personally gives the response. (T 828 and Ex. 16). In Issues 20 and 24, McFarlane's answers to readers letters stated that he named Tony Twist after Appellant. Issue 24 was published before issue 20. (T 828). In Issue 24 McFarlane responded to a letter from a fan who noticed the comic character was named after real people. McFarlane responded:

...Whenever I choose a name I try to have a little bit of a play
on it which includes amongst other things, I am a big hockey
fan, and a lot **of my characters have been named after**

current NHL hockey players. For example, Antonio Twistelli a.k.a. **Tony Twist is actually the name of a hockey player of the Quebec Nordiques. There have been many hockey references throughout my career in my books.**

(T 371; Exhibit 16, Issue 24) (emphasis supplied).

In Issue 20 published in November of 1994, a hockey and Spawn fan from British Columbia, Canada, asked "Is it just me, or are there a lot of Quebec Nordiques in your stories?" McFarlane answered,

Good eyes, Rob. As a self-proclaimed hockey fanatic you are absolutely correct in noticing hockey players' names in my book. Sometimes **I use their full names and sometimes just their last.** Let's make a check list of some of the names I've used so far: Burke, Williams, Sakic, **Twist**, Linden, Roenick, and a few others I can't think of right now. I love hockey!! So the current strike is killing me right now. **But, you will continue to see current and past hockey players' names in my books.** This is not just particular to Spawn either as I had Wayne Gretzky all over the Spider-Man book I wrote.

(T 371; Exhibit 16, Issue 20) (emphasis added).

McFarlane knew that Appellant was known to hockey fans as an "enforcer" and that hockey fans appreciate watching "enforcers". (T 851). In May 1997, McFarlane used

Appellant's name in the HBO Spawn animated series. He knew that Appellant, as a professional athlete, had a fan base. (T 851). McFarlane agreed that Appellant was one of the top five "enforcers" in the NHL (McFarlane Vol. 1, p.243). McFarlane is part owner of the Edmonton Oilers an NHL team. (T 889).

Todd McFarlane and Image Comics published the "Spawn Bible" (McFarlane Vol. I, p.233; Exhibit 4), which gives the "biographies" of the characters that appear in the comic book. (McFarlane Vol. I p.233-234). The "Tony Twist" biography says, in part, "At the age of 18 Antonio Twistelli came to America and became Tony Twist. He went from a young enforcer of the streets to his current status of vast fortune controlling a criminal empire." (Exhibit 4; McFarlane Vol. I, page 234-237). (Emphasis added).

"Wizard" is a trade magazine for the comic book industry which is directed to the consuming public—comic book readers—and sold at comic book stores and newsstands. (Cunningham 17, 20; Beatty 112-113). From time to time, Wizard publishes Special Editions, and Wizard Spawn Special Edition was published in April 1996. (Exhibit 1).

Scott Beatty authored a number of articles in the Spawn Special Edition. (Beatty 12). Beatty acquired the information in his articles partially from reading Spawn, and in particular, from interviewing McFarlane. (Beatty 27-32). McFarlane told Beatty the character Tony Twist was based on the real life person—Appellant Tony Twist. (Beatty 28).

The article on page 28-31, Appendix A37-40, written by Beatty on this topic is entitled "Spawning Ground". (Beatty 7). The subtitle of "**A Look at the real-life people Spawn characters are based upon**" starts off:

Having trouble coming up with character names? Use the Todd McFarlane Method. McFarlane uses the names of his family and friends with it comes to the character identities inside his comic book *Spawn*.

"It's easier to come up with the names of people sitting next to you," the writer/artist explains. "And for the most part, if I don't put my friends and family in my books, I guarantee that nobody at Marvel is going to do it for me. I do it just because I can. I've got that freedom. It's one of the great things about controlling your own book."

Named for loved ones, friends, colleagues and employees at Todd McFarlane Productions, a few of the characters appearing in *Spawn* **feature similarities to their real-life**

counterparts. Many others **appropriate** only the name, sometimes being introduced and dispatched in the same issue.

The following is a collection of the most notable players,
as well as some interesting cameos:

(Emphasis supplied.) This is followed by biographies of the characters with a photo of the live person and the comic book character. Except for the word "goon", the information in Wizard Spawn Tribute section "Spawning Ground", on Tony Twist, was told to Beatty by McFarlane. (Beatty 31, 51). Appendix A38 shows a picture of the comic character "Tony

Twist" and a photo of Appellant Tony Twist in a Blues uniform. It is captioned Anthony **"Tony Twist"** Twistelli, and states, **"Real-Life Persona: Tony Twist. Relation: NHL St. Louis Blues right winger. The Mafia don. . . is named for former Quebec Nordiques hockey player Tony Twist, now a renowned enforcer (i.e. "Goon") for the St. Louis Blues of the National Hockey League."** (Emphasis added).

When McFarlane named the character Tony Twist, he knew the real Tony Twist was playing for the Quebec Nordiques, (T 757), because McFarlane was a hockey fan. (T794). McFarlane watched hockey all his life, grew up in Canada, and one of the things that's part of hockey, and always has been, is fighting. (T 796). He recognized Tony Twist's role in hockey as being an enforcer. (T 793). In issue 22, McFarlane named a character "Joe Sakic". Sakic was Tony Twist's bookkeeper in the comic. At that time, he knew Tony Twist was, in fact, a teammate of Sakic's and an enforcer for Sakic on the Quebec Nordiques. (T 827). He also used hockey player's names of Burke, Williams, Sakic, Lindon and Roenick, and he knew they were hockey players. (T 828).

Respondent TMP is the entity which creates and produces the Spawn comic books, (McFarlane, Vol. I, 7), and held the right to license all Spawn products until after this lawsuit was filed. (T 870). Each comic book which uses Appellant's name was created and produced by TMP. (McFarlane, Vol. I, 7, 11-12). TMP licensed HBO to produce and broadcast the Spawn HBO animated series which used Appellant's name. (McFarlane, Vol. I, 55-56; Exhibit 26). As set forth above, Respondent McFarlane was at all times the president and an owner of TMP. (T 623).

McFarlane created and controls TMP International to produce toys and action figures based on the Spawn story line. (T 694-695). TMP International produced two action figures which used the name of Appellant Tony Twist in comic books produced by TMP International and which were enclosed with action figures. (T 700-701). The actions figures which included the comic books using Appellant's name were based on characters from the Spawn comic books, namely "Overt-kill" and "Tremor". (T 700-701). The packaging of each of the action figures included an original comic book which served to explain the background of the character. (T 700-701). Each of the comic books included the name "Tony Twist". (T 700-701; Exhibits 233 and 234).

Respondents created Todd McFarlane Entertainment, Inc. in 1998 after Appellant filed this action. It was created to hold the licenses to create Spawn products for television and motion pictures. (Fitzgerald 6-7). Videos and DVDs of the HBO Spawn animated series have the name of McFarlane Entertainment on their covers. (Exhibits 23, 24, 25). McFarlane owns 90 percent of the stock of the company. (Fitzgerald 6-7). McFarlane totally controls Respondent McFarlane Entertainment. (Fitzgerald 6-7).

Respondent Image Comics, Inc. solicits, markets, prints, distributes and collects funds for the Spawn comic books including "Curse of Spawn" and "Violator" (T 59-60; Exhibits 16, 17, 18). As set forth above, at all relevant times, McFarlane was the president of Image and an owner. (McFarlane, Vol. I, 27). In addition to the knowledge of its president, McFarlane, regarding the intentional use of Appellant's name, Image also had knowledge of the use of Appellant's name as part of the production of the comic books.

Image typeset the letters section, "Spawning Ground", of each comic book. (McFarlane, Vol. 1, 172-174, 183-184). Image specifically typeset the letters sections of Issues 20 and 24 of Spawn in which McFarlane admitted that the character Tony Twist was named for Appellant. (McFarlane, Vol. 1, 172-174, 183-184). Therefore, Image had independent knowledge of the fact that it used Appellant's name. In addition, employees of Image advertised Spawn comic books in a publication called "Previews". (McFarlane, Vol. II, 92-100). Image employees drafted and prepared the ads. (McFarlane, Vol. II, 92-100). A number of those ads, referred to as solicitations, used Appellant's name "Tony Twist" and included artwork of the character. (McFarlane, Vol. II, 92-100). Image therefore used Appellant's name to solicit purchases of comic books. (Exhibit 79). Significantly, Image was paid to prepare and submit the ads and solicitations and produce the comic books. (McFarlane, Vol. II, 92-100).

Evidence of "Advantage" to Respondents Or "Harm" to Appellant

Advantage to Respondents

Respondent McFarlane testified that everything he did with respect to Spawn and Spawn products was **designed** toward making Spawn and the Spawn products more marketable to the public. (McFarlane, Vol. 1, p. 251). There was extensive evidence from McFarlane as to what actions he took as part of his design to make Spawn and Spawn products more marketable to the public. McFarlane chose to use Appellant's name in Spawn products. (McFarlane, Vol. I, 27). McFarlane marketed Spawn products specifically to children and hockey fans. (T 131-136). This is the fan base of Appellant.

(T 131-132). In an interview appearing at the end of the Spawn HBO animated series video tape, (Exhibit 23), which was licensed by McFarlane, TMP and McFarlane Entertainment, McFarlane stated that although parents and certain adults may not like Spawn, the "kids I want to hit will say it's really cool". (Ex. 23). McFarlane admits that he markets his products to kids. (T 134; Exhibit 23).

Respondents extensively marketed their Spawn products to hockey fans. They produced and licensed Spawn logo hockey pucks, hockey jerseys and toy ice cleaning machines ("Zamboni"). (T 784, 787). Respondents sponsored a youth hockey team and put the Spawn logo on their jerseys. (Exhibit 16). Respondents then promoted their sponsorship to their readers in the Spawn comic book. (Exhibit 16). Respondents held a "Spawn Night" at a Detroit Whalers game where McFarlane personally appeared. (McFarlane, Vol. 1, 272 and Exhibit 63). Respondents gave away numerous Spawn comic books and Spawn products such as toys, which included hockey pucks, hockey jerseys, Spawn Bible, other items all of which bore the Spawn logo. (McFarlane, Vol. 1, 274, 283, 284). Some of the items distributed at the "Spawn Night" were produced or licensed by Respondents TMP, Image and TMP International. The **intent** of doing the Spawn night and giving away the various Spawn products was to market Spawn products to hockey fans (McFarlane, Vol. I, 291). Respondents attempted to arrange a "Spawn Night" at a Phoenix Coyotes game and sent promotional materials to "NHL Weekly", a hockey magazine. (McFarlane, Vol. II, 22-23; McFarlane, Vol. II, 24-25; T 783-784, 787-788 and Exhibit

68). This was also done with the **intent** to market Spawn products to hockey fans. (McFarlane, Vol. II, 24).

Appellant Tony Twist's fan base consists primarily of hockey fans and children. (T 131, 360, 409). As set forth on pages 17-18, Appellant did extensive charitable work relating to children which developed his fan base. (T 129-130). Appellant was nationally known as a hockey player and star in the NHL. (Exhibits 197-202). Twist was featured in national publications such as "Sports Illustrated," "Rolling Stone," "Hockey Star," and mentioned in "Time". (T 130; Exhibits 197-201). Twist was featured on HBO's program "Real Sports with Bryant Gumbel" which is broadcast nationally. (Exhibit 202). Twist was featured in "St. Louis Magazine," and was the only hockey player in St. Louis to ever have his own TV show. (T 130).

The connection between Respondents' marketing of their products to hockey fans and kids, and Appellant's fan base of hockey fans and kids created a pecuniary advantage for Respondents from the use of Appellant's name. (T129, 272, 273). The marketing principle applicable to Respondent's efforts goes by the name of "match up" or "fit." It is like a triangle, with one point being the Spawn franchise, another point is Appellant's name and persona, and the third point is the audience Appellant has developed among hockey fans and kids, the same audience Respondents market Spawn to. (T 135, 136). The match up fits perfectly with targeting hockey fans and kids by Respondents. (T 136). The use of Appellant's name has a commercial monetary value to the Spawn franchise and products. (T 128-129,136).

The advantage derived from Respondents' use of Appellant's name was shared by all the Respondents. As set forth on pages 21-27 above, each Respondent individually used Appellant's name. In addition, Respondents had an elaborate cross marketing scheme to ensure that each product supported the sales of all the others. As part of their cross marketing scheme, each product included references to the other products and advertisements for those products. (McFarlane 96-99; Exhibits 39 and 44). In exhibits 39 and 44, Respondents explained, in internal documents, the details of their plans to cross market all Spawn products. As part of the cross marketing plan, when a consumer purchased the HBO Spawn home video there was an insert promoting the comic books, action figures, video games and other products. (Exhibit 23). In another example, Respondents inserted comic books containing Appellant's name in action figures produced by Respondent TMP International. (T 760-762). At trial, McFarlane admitted his intent in using the comic books with Tony Twist's name in them is to promote the sale of the toys, and to add value to them. (T 762). He also used the toys to market the comic books. (T 762-763). The cross marketing scheme included the comic books, video games, video and laser discs, trading cards and clothing. (Exhibit 44). Respondents stated in their internal documents that this scheme would get their marketing message out to no less than 14.55 million people within a 4-6 month period. (Exhibit 39). McFarlane stated that the **intent** of this scheme was to increase **revenues** of **all** Spawn products. (McFarlane, Vol. II 106-108). This cross marketing scheme meant that **all** Spawn products derived **value** and

advantage from **all others** and therefore products which did not directly use Appellant's name derived an advantage from the use. (T 156-158).

Witnesses Brian Cunningham and Scott Beatty testified that Respondents derived an advantage from their use of Appellant's name. Cunningham, the editor of Wizard magazine, testified that in his profession, and as a fan, he reads about 100 comic books a month. (Cunningham 46). He testified Respondents derived value from the use of Appellant's name, (Cunningham 107-108), and that names of characters are important to the **sale** of comic books. (Cunningham 106-107). Beatty testified that, from a marketing standpoint, there is a very strong link between comic fans and toy fans. (Beatty 119). Respondents took advantage of this link by marketing their toys in the comic books. (Exhibit 16).

The evidence also reflected that Respondents trademarked their use of Appellant's name. (Cunningham 108-109). A trademark means someone is claiming ownership of a character, and is used to protect that property claim. The claimant of a trademark perceives that the ownership has value. (Cunningham 110). By Todd McFarlane claiming a trademark in the name Tony Twist, it means that McFarlane perceives it as having **value** to him, and wants to protect it. (Cunningham 111). It means that Todd McFarlane believes he **owns** the name Tony Twist. (Cunningham 111).

In addition to the evidence set forth above, Appellant's experts Dr. Till and Arceneaux each testified that Respondents derived a pecuniary advantage from their use of Appellant's name. (T 129 and Arceneaux 25, 26). The qualifications of Dr. Till and Arceneaux are set forth in detail under Point II E of this brief.

Respondent's Use of Appellant's Name Caused Him Harm

Testimony as to some of the damage was given by Sean Phillips. Sean Phillips and his brother, Bill, founded Experimental Applied Science Company (EAS) in about 1994. (Phillips 5, 6). It is the largest sports nutrition company and grossed about \$162 million through 1999. (Phillips 6). Phillips was executive vice president of EAS from its origin up to December 1, 1999, (Phillips 6, 84). One of his responsibilities was finding new talent among athletes and procuring them for EAS. (Phillips 8).

Phillips met Twist in the summer of 1999 when Phillips, John Elway and other athletes participated in a charity motorcycle ride to raise money for the Head First Foundation, which helps children. (Phillips 33, 34). It was the "Twister Ride" and organized by Appellant. (Phillips 33). Phillips was impressed with Appellant's ease and presence on camera, his good speaking ability, and his passion and commitment. (Phillips 35, 36).

In July or August 1999, Phillips spoke to Appellant about Appellant being an endorser for EAS products. (Phillips 38, 67), and subsequently had several phone conversations with Twist. (Phillips 37-38). Twist went to Denver in September 1999 to meet with Phillips about the endorsement contract. (Phillips 8). Other EAS people—Mike Parisi and Tim Grover—were present at the meeting with Appellant. (Phillips 42). Phillips offered Twist an athletic endorsement contract with compensation to Appellant of \$100,000 per year. (Phillips 8, 9). At that time, Twist was on crutches and in a brace from a motorcycle accident a few weeks earlier. (Phillips 15). That made no difference to

Phillips, as he saw a great opportunity to get Twist back on the ice and make an incredible comeback while he was an endorser of EAS. (Phillips 15-17). EAS was doing the same thing with Terrell Davis, and as Phillips put it, "It was a real—actually an unfortunate accident but a unique opportunity." (Phillips 15-17).

Twist mentioned the use of his name in Spawn and Phillips requested more information. (Phillips 11, 12). Twist sent Phillips a package of information including the Spawn video and Spawn Wizard Tribute. (Phillips 12, 13, 14). After reading and reviewing the Spawn materials, Phillips concluded that Twist's name, because of its association with Spawn, would potentially damage the EAS brand and withdrew the \$100,000 endorsement offer. (Phillips 14).

The only reason Phillips withdrew the offer was the negative connections between Appellant and the "Tony Twist" character in the Spawn video. (Phillips 14, 17, 84-85). Phillips had authority to bind EAS to an endorsement contract. (Phillips 84).

Earl Bellamy, general counsel for EAS, testified by deposition for Respondents. He stated Sean Phillips was executive vice president of EAS up to the end of November 1999. (Bellamy 19, 20). Phillips had authority to negotiate with potential endorsers for EAS, (Bellamy 27), in the August-September 1999 time frame. Phillips had the legal authority to sign endorsement contracts for EAS. (Bellamy 90). Five or six athletes that were under endorsement with EAS were paid \$100,000 per year or more. (Bellamy 44).

Bellamy didn't know Sean Phillips was negotiating with Tony Twist, but when he learned of that, it didn't surprise him, nor did the amount involved—\$100,000 surprise him.

(Bellamy 69). If Sean Phillips decided that EAS should not enter into an endorsement contract, the matter would never get to Bellamy. (Bellamy 79-80). Sean Phillips' decision to not enter into an endorsement contract was final. (Bellamy 80).

Appellant's experts, Dr. Till and Rocky Arceneaux testified that the unauthorized use of Appellant's name negatively affected Appellant's value as an endorser. (T 137; Arceneaux 88-90).

Appellant did not Consent to the Use

Appellant did not consent to the use of his name in any manner by Respondents. (T 392). Respondents admitted that they did not have Appellant's consent to use his name. (T 714).

Damages

In addition to the loss of the \$100,000 EAS contract described above, Dr. Till gave expert testimony that the use of Appellant's name had a fair market value of 15% of the revenues of Spawn products in which his name is used, (T 136), as compensation for using Appellant's name in the products in which it was used. (T 136, 137). The association with the Spawn products has a negative effect on Appellant's attractiveness as an endorser of products or services to companies. (T 137, 138).

Dr. Till also testified that the use of Appellant's name by Respondents has a fair market value of 9% of the revenues of Spawn products, in which his name was not used. That is because the use of Appellant's name early on in the franchise gives the franchise

momentum and interest, and because the Spawn related products such as toys, action figures, video games were all cross-marketed with the Spawn comics. (T 156-158).

Finally, Dr. Till testified that a significant portion of the value of Appellant's name results from Appellant's own effort, energy and time developing good will around his name through his involvement with charities and children, (T 159), and from developing his professional expertise as a hockey "enforcer." (T 159-160). A celebrity such as Appellant is like a brand name. (T 159). McFarlane made the link between Appellant and Tony Twist, the character, by identifying the Spawn character as an "enforcer" and stating in his fan letter responses, that the character is named after Appellant, the "enforcer" hockey player. (T 160). Appellant's name had positive associations in his NHL career, but his name association with the Spawn franchise has a negative effect, and reduces his appeal and value to companies as an endorser of their products. (T 270-271).

Joseph (Rocky) Arceneaux, a certified sports contract advisor testified for Appellant. (Arceneaux 6). Arceneaux reviewed certain Spawn products and information regarding other product endorsement contracts, and based upon his knowledge and experience in negotiating endorsement contracts for athletes, (Arceneaux 35), he opined that the use of Appellant's name had a fair market value of 20% of all Spawn revenues. (Arceneaux 25). In arriving at that conclusion, he attributed 5% to the negative aspect of the Spawn comic which would result in a lack of future endorsements for Appellant. (Arceneaux 47-48). In Arceneaux's opinion, Appellant could not get an endorsement for a

"good guy shoe company or something like that", (Arceneaux 89), as a result of the way the character "Tony Twist" portrayed in Spawn. (Arceneaux 42, 43).

In forming their opinions, Dr. Till and Arceneaux reviewed and considered two situations where athletes were used in comic books. Dr. Till and Arceneaux reviewed a contract where Karl Malone, an NBA basketball player, granted a company the right to use his name and likeness in a comic book. (T 150; Arceneaux 28). By the terms of that contract, Karl Malone received 15% of the **gross** sales of the comic books over 50,000 and 25% of the **gross** sales of merchandise. (T 146). In the other situation, Dr. Till and Arceneaux reviewed and considered a deal where a comic book producer offered to pay 9% of **gross** sales of its comic books for the right to use the names and likeness of a number of NHL hockey players in a comic book series. (Exhibit 209). Of the hundreds of current NHL players, Appellant was one of only 16 that the comic book producer wanted to use in the comic book. (Exhibit 209). Dr. Till and Arceneaux stated that these contracts illustrated the fact that athletes are sometimes paid based on a percentage of **gross** revenues. (T 146-149; Arceneaux 40).

Jay Barrington, a Certified Public Accountant, testified with respect to the revenues of Respondents derived solely from Spawn and Spawn products, (T 515), based upon financial reports provided by Respondents. (T 523). Exhibit 218 contains a summary regarding the revenue of the Respondents for Spawn products, and not from any other products. (T 525). Barrington applied the percentages testified to by Dr. Till and Arceneaux to the revenues of Respondents. Barrington testified that Respondents' total

gross revenue from Spawn products was \$122,708,261. (Exhibit 218 and T 551).

Respondents' own experts agreed with Barrington's gross revenue calculations. (T 1066-1067).

At the hearing on Respondents' post-trial motions with respect to the amount of the verdict, the trial court said, "**Well, you know, it's supported by the evidence**, except I don't recall any evidence that a hockey player ever got 20 percent of any operation remotely comparable to the defendant." (T 1244) (emphasis added).

The unanimous jury verdict was for \$24,500,000. The jury wrote its method for computing the \$24.5 million verdict on the verdict form and it stated that the jury awarded 15% of the gross revenues plus 5% for the negative impact on Appellant. (A79-81; LF 1287-1289). The total –\$24,500,000 – represented 20% of the Respondent's revenues derived solely from Spawn and Spawn products. The verdict was in accordance with the evidence.

Injunction Under Count VI

Appellant sought to enjoin Respondents from further use of his name in Spawn products. Respondents continued to use Appellant's name even after Appellant filed suit against them, (Exhibits 211; T 379-380), and continued to create and publish comic books using his name. (Exhibits 211 ; T 379-380). Respondents continued to allow the broadcasts and sale of HBO Spawn animated series containing Appellant's name. (Exhibit 165; T 873). In response to an interrogatory which was read to the jury at trial, McFarlane said he had not yet decided whether he would continue using Appellant's name. (Exhibits

228, 229). When asked at trial, McFarlane stated that he had not made up his mind as to whether he would continue to use Appellant's name. (T 890).

The trial court's judgment of October 31, 2000 (Appendix A1-21) recognized the Respondents were continuing and would continue to use Appellant's name, but, after entering the JNOV in favor of Respondents, denied injunctive relief. (Appendix A7-13; LF 1392-1398).

POINTS RELIED ON

I.

**THE COURT ERRED IN GRANTING RESPONDENTS
JUDGMENT NOTWITHSTANDING THE VERDICT
(JNOV) AND IN HOLDING APPELLANT FAILED TO
MAKE A SUBMISSIBLE CASE ON THE TORT OF
WRONGFUL APPROPRIATION OF APPELLANT'S
NAME BECAUSE:**

(A) The court erroneously found *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) and 1st Amendment requirements in defamation cases required that Appellant prove, and the jury find that, at the time Respondents intentionally appropriated Appellant's name, Respondents also concomitantly, specifically intended to use Appellant's name for their economic benefit, and did derive an economic benefit therefrom, or specifically intended to injure Appellant's marketability of his name. Neither Missouri law, nor the 1st Amendment requires proof of these specific intents, and Missouri law requires only that Respondents intentionally used Appellant's name

**without his consent and to their advantage to establish the
tort of wrongful appropriation of name.**

PRINCIPAL AUTHORITIES:

Haith v. Model Cities Health Corp. of Kansas City, 704 S.W.2d 684

(Mo. App. 1986)

Hustler Magazine v. Falwell, 485 U.S. 46 (1988)

Nemani v. St. Louis University, 33 S.W.3d 184 (Mo. banc 2000), reversing

Nemani v. St. Louis University, November 2, 1999 (Mo. App. E.D.)

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977)

**(B) The Court erred in holding the evidence was
insufficient for the jury to find Respondents intentionally
appropriated Appellant's name to Respondents' advantage
or to Appellant's detriment, without Appellant's consent
in that the evidence did support a jury finding that
Respondents did appropriate Appellant's name without
his consent and to their advantage and to the detriment of
Appellant.**

PRINCIPAL AUTHORITIES:

Haith v. Model Cities Health Corp. of Kansas City, 704 S.W.2d 684

(Mo. App. 1986)

Hatch v. V.P. Fair Foundation, 990 S.W.2d 126 (Mo. App. E.D. 1999)

Nemani v. St. Louis University, 33 S.W.3d 184 (Mo. banc 2000), reversing

Nemani v. St. Louis University, November 2, 1999 (Mo. App. E.D.)

Waters v. Bankers Life Assurance Association, 50 S.W.2d 183

(Mo. App. W.D. 1932)

(C) The Court erred in holding that the evidence was insufficient to make a submissible case even under the Court's re-definition of the elements of the tort of wrongful appropriation of Appellant's name because the evidence did support a jury finding in favor of Appellant.

PRINCIPAL AUTHORITIES:

Carpenter v. Chrysler Corp., 853 S.W.2d 346 (Mo. App. E.D. 1993)

II.

**THE COURT'S ORDER GRANTING A NEW TRIAL WAS
ERROR IN THAT:**

**(A) IT REQUIRED THAT THE VERDICT
DIRECTING INSTRUCTIONS, INSTRUCTIONS 6, 8, 10
AND 12, SHOULD HAVE INCLUDED A REQUIREMENT
THAT THE JURY FIND THAT RESPONDENTS
SPECIFICALLY INTENDED TO USE APPELLANT'S
NAME FOR THEIR ECONOMIC BENEFIT OR
SPECIFICALLY INTENDED TO INJURE APPELLANT'S
MARKETABILITY OF HIS NAME BECAUSE THESE
ELEMENTS ARE NOT REQUIRED FOR WRONGFUL
APPROPRIATION AND NOT REQUIRED TO BE IN
VERDICT DIRECTING INSTRUCTIONS;**

PRINCIPAL AUTHORITIES:

Haith v. Model Cities Health Corp. of Kansas City, 704 S.W.2d 684

(Mo. App. 1986)

Munden v. Harris, 134 S.W.2d 1076 (Mo. App. W.D. 1911)

Nemani v. St. Louis University, 33 S.W.3d 184 (Mo. banc 2000), reversing

Nemani v. St. Louis University, November 2, 1999 (Mo. App. E.D.)

**(B) IT REQUIRED THE JURY TO BE
INSTRUCTED THAT APPELLANT WAS REQUIRED TO
SHOW AN APPROPRIATION OF THE "COMMERCIAL
VALUE" OF APPELLANT'S NAME, BECAUSE
MISSOURI LAW SPECIFICALLY REJECTS A
REQUIREMENT THAT APPELLANT SHOW AN
APPROPRIATION OF THE "COMMERCIAL VALUE"
OF APPELLANT'S NAME;**

PRINCIPAL AUTHORITIES:

Haith v. Model Cities Health Corp. of Kansas City, 704 S.W.2d 684

(Mo. App. 1986)

Nemani v. St. Louis University, 33 S.W.3d 184 (Mo. banc 2000), reversing

Nemani v. St. Louis University, November 2, 1999 (Mo. App. E.D.)

**(C) IT HELD THAT THE DISJUNCTIVE SUBMISSION
IN THE VERDICT DIRECTING INSTRUCTION WAS
INCORRECT IN THAT THERE WAS NO EVIDENCE OF
ADVANTAGE TO RESPONDENTS FROM THEIR USE
OF APPELLANT'S NAME, BECAUSE THERE WAS
SUBSTANTIAL EVIDENCE OF ADVANTAGE TO
RESPONDENTS FROM THEIR USE OF APPELLANT'S
NAME;**

PRINCIPAL AUTHORITIES:

Eaton v. Norfolk & Western Railway Company, 936 S.W.2d 146

(Mo. App. E.D. 1996)

**(D) IT HELD THAT THE INSTRUCTIONS
GIVEN TO THE JURY ON DAMAGES, NAMELY
INSTRUCTION NO. 16, WAS INCORRECT BECAUSE IT
FAILED TO LIMIT THE DAMAGES AS TO EACH
RESPONDENT TO THE AMOUNT OF BENEFIT EACH
RECEIVED FROM THEIR USE OF APPELLANT'S
NAME, BECAUSE THE INSTRUCTIONS GIVEN TO THE
JURY REGARDING DAMAGES WERE CORRECT,
BECAUSE RESPONDENTS WERE JOINTLY AND
SEVERALLY LIABLE AND INSTRUCTION NO. 16 IS
MAI 4.01;**

PRINCIPAL AUTHORITIES:

Linkogel v. Baker Protective Services, Inc., 626 S.W.2d 380 (Mo. App. E.D. 1981)

Mo. Pacific Railroad v. Whitehead and Kales, 566 S.W.2d. 466 (Mo. banc 1978)

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977)

Section 537.067 RSMo.

**(E) IT HELD THAT THE TESTIMONY OF
APPELLANT'S EXPERTS DR. TILL AND ARCENEUX**

**ON THE ISSUE OF DAMAGES SHOULD HAVE BEEN
EXCLUDED, BECAUSE THERE WAS A PROPER
FOUNDATION FOR THE TESTIMONY OF DR. TILL
AND ARCENEUX; THEIR TESTIMONY WAS
PROPERLY ADMITTED AT TRIAL; AND
RESPONDENTS DID NOT PRESERVE OBJECTIONS TO
THE EVIDENCE AT TRIAL.**

PRINCIPAL AUTHORITIES:

M.C. v. Yeargin, 11 S.W.3d 604 (Mo. App. E.D. 1999)

Schreibman v. Zanetti, 909 S.W.2d 692 (Mo. App. W.D. 1992)

Wulfin v. Kansas City Southern Industries, Inc., 842 S.W.2d 133
(Mo. App. W.D. 1992)

Section 490.065, RSMo. 1994

**(F) IT HELD THAT THE VERDICT WAS
AGAINST THE WEIGHT OF THE EVIDENCE, BECAUSE
THERE WAS OVERWHELMING EVIDENCE IN
SUPPORT OF THE VERDICT AND THE TRIAL COURT'S
JUDGMENT STATED SPECIFIC GROUNDS AS THE
BASIS FOR THE AGAINST THE WEIGHT OF THE
EVIDENCE ORDER, AND IS THEREFORE NOT A
DISCRETIONARY RULING.**

PRINCIPAL AUTHORITIES:

Guzman v. Hanson, 988 S.W. 2d 550 (Mo. App. E.D. 1999)

Lifritz vs. Sears Roebuck & Co., 472 S.W.2d 28, 32-33 (Mo. App. E.D. 1971)

III.

THE COURT ERRED IN DENYING APPELLANT AN INJUNCTION AGAINST THE FURTHER USE OF HIS NAME BY RESPONDENTS IN THAT (1) APPELLANT HAD AN ADEQUATE REMEDY AT LAW; (2) THAT THE U.S. CONSTITUTION AMENDMENT 1 PROHIBITED AN INJUNCTION; AND (3) THAT AN INJUNCTION WOULD CONSTITUTE PRIOR RESTRAINT, BECAUSE, THE REMEDY AT LAW FOR DAMAGES RESULTING FROM RESPONDENTS' PAST CONDUCT IS INADEQUATE TO PREVENT REPETITIVE AND CONTINUING DAMAGE BY RESPONDENTS' USE OF APPELLANT'S NAME; THE U.S. CONSTITUTION DOES NOT PROHIBIT AN INJUNCTION, AND, AN INJUNCTION WOULD NOT CONSTITUTE UNCONSTITUTIONAL PRIOR RESTRAINT BECAUSE THE JURY FOUND THE USE OF APPELLANT'S NAME WAS UNLAWFUL.

PRINCIPAL AUTHORITIES:

Fidelity & Casualty Co. of N.Y. v. Western Casualty & Surety Co.,

337 S.W.2d 566 (Mo. App. E.D. 1960)

Flint v. Hutchison, Smoke & Burner Co., 19 S.W. 804 (Mo. 1892)

Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,

413 U.S. 376 (1973)

Wolfe v. Harris, 184 S.W. 1139 (Mo. 1916)

STANDARD OF REVIEW

Judgment Notwithstanding the Verdict

A JNOV should not be entered unless Plaintiff failed to make a submissible case.

In *Dockery v. Mannisi*, 636 S.W.2d 372, 376 (Mo. App. E.D. 1982) this Court held:

A motion for judgment n.o.v. presents the same issues as a motion for directed verdict at the close of the evidence: did the plaintiff make a submissible case? Rule 72.01(b); *Bennett v. North Brighton Townhouses, Inc.*, 588 S.W.2d 100, 103[5] (Mo. App. 1979).

This court is to review "the evidence and reasonable references therefrom in a light most favorable to the jury's verdict." *Seitz v. Lemay Bank and Trust Co.*, 959 S.W.2d 458, 461 (Mo. banc 1998). And, finally, "An appellate court will affirm entry of a judgment notwithstanding the verdict only when all the evidence and reasonable inferences drawn therefrom are so strongly against the plaintiff's case that there is no room for reasonable minds to differ and the defendant is entitled to judgment as a matter of law." *Hatch v. V.P. Fair Foundation*, 990 S.W.2d 126, 135 (Mo. App. E.D. 1999). In *Layton, et al. v. Baris*, 43 S.W.3d 390, 393 (Mo. App. E.D. 2001), the court reversed a JNOV entered by the trial court. In stating the standard for review, the court held:

Review of the trial court's ruling on the motion for judgment notwithstanding the verdict is performed regarding the evidence in the light most favorable to the jury's verdict. *Seitz*

v. Lemay Bank & Trust Co., 959 S.W.2d 458, 461 (Mo. banc 1998). We look at all favorable evidence and reasonable inferences flowing therefrom, discarding all unfavorable evidence and inferences, *Id.* We will affirm the trial court's grant of the motion only where we find that the plaintiff failed to make a submissible case. *Jungerman vs. City of Raytown*, 925 S.W.2d 202, 204 (Mo. banc 1996). A presumption exists favoring the reversal of a motion for verdict notwithstanding the verdict. *Faust v. Ryder Commercial Leasing & Servs.*, 954 S.W.2d 383, 388 (Mo. App. 1997). We leave the ruling intact only where the favorable evidence and inferences are so strongly against the plaintiff as to leave no room for reasonable minds to differ as to the result. *Id.*

Essentially, a motion for judgment notwithstanding the verdict is a challenge to the submissibility of the case. *Allstates Transworld Vanlines, Inc. v. Southwestern Bell Tel. Co.*, 937 S.W.2d 314, 316 (Mo. App. 1996).

Id. at 394.

To the same effect is *Nooney Krombauch v. Blue Cross & Blue Shield of Mo.*, 929 S.W.2d 888 (Mo. App. E.D. 1996), where the court reversed a JNOV and ordered the verdict reinstated. Where a JNOV is based upon an issue of law, the Appellate Court also reviews the trial

court's decision de novo, *Faust v. Ryder Commercial Leasing & Servs.*, 954 S.W.2d 383, 388 (Mo. App. W.D.1997), and the court will reverse a JNOV where the trial court misinterpreted the law or failed to apply the correct Missouri law. *Hatch v. V.P. Fair Foundation, Inc.*, 990 S.W.2d 126, 136 (Mo. App. E.D. 1999).

STANDARD OF REVIEW

On Grant of New Trial

The standard of review of a trial court's grant of a new trial, is generally an "abuse of discretion" standard. *Guzman v. Hanson*, 988 S.W. 2d 550, 554 (Mo. App. E.D. 1999). An abuse of discretion occurs when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Id.* However, the trial court's power to grant a new trial is discretionary only as to questions of fact and matters affecting the determination of the issues of fact. **There is no discretion in the law of the case.** *Rodman v. Schrimpf*, 18 S.W.3d 570, 573-574 (Mo. App. W.D. 2000).

STANDARD OF REVIEW

On Injunction Count

The standard of review of a judge-trying case is generally governed by Rule 73.01(c) of the Missouri Rules of Civil Procedure as construed in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976). This standard generally applies to review of a trial court's grant or denial of a permanent injunction, *West Group Broadcasting, Ltd. v. Bell*, 942 S.W.2d 934 (Mo. App. S.D. 1997), when the court, not a jury, decides all factual issues. However, it is modified when fact issues in the case are submitted to a regular jury. As to those issues, here the issue of whether respondents appropriated appellant's name to their advantage without his consent, the trial court is bound by the jury verdict. *Fidelity & Casualty Co. of N.Y. v. Western Casualty & Surety Co.*, 337 S.W.2d 566, 573-574, 586 S.W.2d 47, 50 (Mo. App. E.D. 1960); *State Farm Mutual v. Johnson*, 586 S.W.2d 47, 50 (Mo. App. E.D. 1979). This court's review is limited as in other civil jury verdicts.

The *Murphy v. Carron* standard states that the judgment of the trial court should be reversed where there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law. See, *In re Marriage of Hoffman*, 966 S.W.2d 797, 799 (Mo. App. S.D. 1999), and see, *West Group Broadcasting Ltd. v. Bell*, 942 S.W.2d 934, 936 (Mo. App. S.D. 1997). That standard is applicable to the equitable issues properly for decision by the trial judge, but is not applicable to the fact issues submitted to and decided by the jury. *Fidelity & Casualty Co.*, *supra*, and *State Farm Mutual*, *supra*.

As applied to the instant case, the teachings of *Fidelity & Casualty, supra* and *State Farm Mutual, supra* are threefold. One: the trial court erred when it substituted its opinion as to the witness credibility for that of the jury, and then re-decided jury decided issues contrary to the verdict. The trial court's obligation was to view the evidence in the light most favorable to the verdict, and not to substitute his opinion on witness credibility for the jury determination. Second: In this court's review on issues decided by the jury, it is limited to whether the evidence, in the light most favorable to the verdict, made a submissible case. Third: this court's review of the equitable and legal issues decided by the trial court comes under the standard of *Murphy v. Carron, supra*.

ARGUMENT

I.

**THE COURT ERRED IN GRANTING RESPONDENTS
JUDGMENT NOTWITHSTANDING THE VERDICT
(JNOV) AND IN HOLDING APPELLANT FAILED TO
MAKE A SUBMISSIBLE CASE ON THE TORT OF
WRONGFUL APPROPRIATION OF APPELLANT'S
NAME BECAUSE:**

**(A) The court erroneously found Hustler
Magazine v. Falwell, 485 U.S. 46 (1988) and 1st
Amendment requirements in defamation cases
required that Appellant prove, and the jury find that, at the
time Respondents intentionally appropriated Appellant's
name, Respondents also concomitantly, specifically
intended to use Appellant's name for their economic
benefit, and did derive an economic benefit therefrom, or
specifically intended to injure Appellant's marketability
of his name. Neither Missouri law, nor the 1st
Amendment requires proof of these specific intents, and
Missouri law requires only that Respondents
intentionally used Appellant's name without his consent**

and to their advantage to establish the tort of wrongful appropriation of name.

(B) The Court erred in holding the evidence was insufficient for the jury to find Respondents intentionally appropriated Appellant's name to Respondents' advantage or to Appellant's detriment, without Appellant's consent in that the evidence did support a jury finding that Respondents did appropriate Appellant's name without his consent and to their advantage and to the detriment of Appellant.

(C) The Court erred in holding that the evidence was insufficient to make a submissible case even under the Court's re-definition of the elements of the tort of wrongful appropriation of Appellant's name because the evidence did support a jury finding in favor of Appellant.

(A.)

It appears that the principal issue, both in the Trial Court, as demonstrated by its judgment grant JNOV, and the opinion of the Appellate Court holding the actual malice requirements of defamation cases apply to a right of publicity case, is whether the First Amendment applies to a right of publicity case.

Wrongful appropriation of name, or right of publicity, is a violation of a property right, and the 1st Amendment to the United States Constitution does not require a specific intent to injure Appellant's marketability of his name, nor a specific intent to derive an economic benefit, nor is "malice" an element and, the U.S. Supreme Court decisions declare that the criteria required in defamation cases do not apply to a right of publicity case. *Zacchini v. Scripps Howard Broadcasting Co.*, 433 U.S. 562 (1977), and *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

Both the Trial Court and the Appellate Court erred by applying First Amendment principles applicable to causes of action for defamation and intentional infliction of emotional distress to Appellant's cause of action for his right of publicity. The lower court's actions in doing so, directly contradict the decision of the U.S. Supreme Court in *Zacchini v. Scripps Howard Broadcasting Co.*, 433 U.S. 562 (1977). The U.S. Supreme Court in *Zacchini*, and subsequently in *Hustler Magazine v. Falwell*, 468 U.S. 46 (1988) recognized a distinction between causes of action which protect the reputation or emotions of individuals on the one hand, defamation and intentional infliction of emotional distress, and the valuable property right protected by the right of publicity. *Zacchini* clearly held that First Amendment protection does not bar an action or create some higher standard of proof with respect to a cause of action for right of publicity. As more fully set forth below, both the Trial Court and the Appellate Court incorrectly applied the First Amendment to Appellant's cause of action. This error led the Trial Court and the Appellate Court to add

additional elements to the tort of right of publicity which are not required by the U.S. Constitution and are in contradiction to established Missouri law.

The U.S. Supreme Court addressed the application of the First Amendment to the tort of right of publicity in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). In *Zacchini*, the Court distinguished defamation claims, where the damages are to the personal reputation of the Plaintiff from the right of publicity. (*Id.* 573). The Court said:

The rationale for protecting the right of publicity is the straightforward one of preventing unjust enrichment by the theft of goodwill. No social purpose is served by having the Defendant get free some aspect of the Plaintiff that would have market value and for which he would normally pay”

Id. 576. In holding the First Amendment protection afforded in defamation cases are not applicable to right of publicity the court said:

These cases, like *New York Times* emphasize the protection extended to the press by the First Amendment in defamation cases; particularly where suit is brought by a public official or a public figure. None of them indicate an alleged appropriation by the press of a right of publicity existing under state laws.

Id. at 574. *Zacchini, supra*, then held the First Amendment did not apply to or afford protections in a right of publicity case. (*Id.* 579).

The *Falwell* Court, in a defamation and intentional infliction of emotional distress case, then confirmed the *Zacchini* holding saying *Zacchini* held “that the actual malice standard does not apply to the tort of appropriation of a right of publicity.” *Falwell* at 52. In effect, *Falwell* distinguished the tort of appropriation of a right of publicity from either defamation or intentional infliction of emotional distress in that the first was not protected by the First Amendment while the latter two were.

The very nature of an appropriation of a person’s name and identity for the Defendant’s advantage - right of publicity - is that the tort has nothing to do with whether appropriation flatters or denigrates Plaintiff. It is simply a property right tort that occurs when a Defendant uses another’s name and identity for Defendant’s advantage without negotiating, paying or getting the consent of the Plaintiff for the use of his name and identity, for a Defendant’s advantage. *Zacchini*, *supra*; *Falwell*, *supra*; *Munden v. Harris*, *supra*; *Haith*, *supra*; and *Nemani*, *supra*. That is what Appellant claims Respondents did here by not only naming the Spawn character “Tony Twist”, but by affirmatively identifying Appellant and appropriating his professional identity in Respondent’s Spawning Ground Column and Wizard Spawns Tribute to attract the attention of hockey fans and kids to Respondent’s products - Spawn and Spawn products.

In *Zacchini*, the U.S. Sup. Ct. granted certiorari to determine “whether the 1st and 14th Amendments immunized respondent broadcasting company from damages for its alleged infringement of petitioner’s [Zacchini] state law ‘right of publicity’.” *Zacchini*, 433 U.S. at 565. The reason the Supreme Court granted certiorari was because the Ohio

Supreme Court had held the defendant Scripps-Howard had 1st Amendment protection, relying on the defamation cases of *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Time Inc. v. Hill*, 385 U.S. 374 (1967), *Zacchini*, 433 U.S. at 567, and required the plaintiff to show malice, just as the Trial Court and the Court of Appeals did in the instant case. In *Zacchini*, the U.S. Sup. Ct. distinguished *New York Times v. Sullivan* and *Time Inc. v. Hill*, identifying them as defamation cases, and said neither case involved an appropriation of a person's name or likeness for purposes of trade, nor did they involve "a performer, a person with a name having commercial value, or any claim to a right of publicity." *Zacchini* 433 U.S. at 572.

The Court in *Zacchini* went on to consider other defamation type cases and said, "These cases, like *New York Times*, emphasize the protection extended to the press by the 1st Amendment in defamation cases, particularly when suit is brought by a public official or a public figure. None of them involve an alleged appropriation by the press of a right of publicity existing under state law." *Zacchini*, 433 U.S. at 574 (emphasis supplied).

The Court then held the right of publicity claim is **not** protected by the 1st Amendment. Subsequently, the U.S. Sup. Ct., in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), reaffirmed the *Zacchini* holding in stating: "the 'actual malice' standard does not apply to the tort of appropriation of a 'right of publicity'". *Hustler Magazine* 485 U.S. at 52.

The Trial Court and the Appellate Court in the instant case did exactly the same thing the Ohio Supreme Court did in *Zacchini*, and that is why the U.S. Sup. Ct. granted certiorari, and then reversed the Ohio Supreme Court, holding the First amendment criteria in

defamation claims as enunciated in *New York Times v. Sullivan*, 376 U.S. 254 (1964) did not apply to a right of publicity case.

The Trial Court said it attempted to harmonize with *Zacchini* and *Falwell*, and concluded that Appellant must prove Respondents specifically intended to use Appellant's name and identity for economic benefit, or specifically intended to harm or injure the Appellant, (A16; LF 1401), because the constitution commands very specific intent in order to sustain claim for defamation. (A16). But the Trial Court ignored *Zacchini*, and applied *Falwell*, a defamation case, not a right of publicity case. This case is not a defamation case. It is an appropriation of name for Respondents advantage or a "right of publicity case."

The Trial Court's view and the Appellate Court opinion misconceives the essential nature of the tort of appropriation of another name and identity for the defendant's advantage, or right of publicity, by likening it to the personal defamation tort of libel, slander and intentional infliction of emotional distress. The U.S. Supreme Court holds the personal defamations torts are constitutionally protected because "one of the prerogatives of American citizenship is the right to criticize public men and measures". *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988). It protects cartoons, editorials, social commentary about public persons and issues. *Falwell* at 54.

It is agreed by all parties, and the slip opinion notes, that "Spawn" was not a comment, parody, criticism or social commentary on Appellant, hockey or the NHL. Also, it is agreed that the comic did not attribute the antics of the character Tony Twist to

Appellant, nor suggest Appellant engaged in any similar conduct. (Slip op. 6, 23, 29). The comic - Spawn - is a product that is wholly unrelated to Appellant. This agreement or admission conclusively demonstrates that Spawn was not “of and concerning” the Appellant. It was a separate unrelated product that was not about Appellant or hockey.

Appellant’s suit was not a defamation type action, such as libel, slander, intentional infliction of emotional distress and did not seek personal defamation damages. Here, Appellant only sought damages to his property right. The Trial Court allowed only evidence of the harm to the value of appellant’s ability to be an endorser of products and the value of Appellant’s name and identity to Respondents. The trial court prohibited evidence of defamation or mental distress.

The slip opinion holds that Respondents are entitled to the protection of the U.S. Const. Amend. I (Slip op.A42,49-50, 55, 59, 67), and holds: “Before Twist can recover on his right of publicity claim he must, therefore, satisfy the *New York Times* ‘actual malice’ standard, knowledge that the statements are false or in reckless disregard of the truth. Prerequisite to satisfying this ‘actual malice’ standard, is that the publication be ‘of and concerning’ the plaintiff.***It is not enough that the publication invokes the plaintiff’s identity or is in some sense ‘about’ the plaintiff. A reader must reasonably believe that the depiction is meant to portray, ‘in actual fact’, the plaintiff acting as described***.” (Slip op. A67). Without specifically stating as much, the Appellate Court’s decision effectively destroys the tort of right of publicity by converting it into defamation.

The slip opinion's holding and the Trial Courts JNOV is derived from defamation cases - not right of publicity cases, it is directly contrary to the 1st Amendment law enunciated in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), a right of publicity case, and *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), an intentional infliction of emotional distress case.

The error of the Trial Court and the Appellant Court with respect to the application of the First Amendment, led them to add elements to the tort of right of publicity which are not correct under Missouri law. The Court's JNOV and the Appellate opinion are contrary to *Munden v. Harris*, 134 S.W. 1076 (Mo. App. W.D. 1911); *Haith v. Model Cities Health Corp. of Kansas City*, 704 S.W.2d 684 (Mo. App. W.D. 1986) and *Nemani v. St. Louis University*, 33 S.W.3d 184 (Mo. banc 2000). Those cases establish the elements of the tort of misappropriation of name in Missouri as being: the defendant used a plaintiff's name and identity for some advantage without plaintiff's consent. As stated in the Appellate opinion, the elements of both torts [misappropriation of name and right of publicity] are the same, as both require the use of plaintiff's identity for some commercial purpose without the plaintiff's consent. They differ only in the types of damages. (A51).

But then, the Appellate opinion adds to the elements of the right of publicity tort, the requirement, or element, of "actual malice" - that the defendant knew the statements made were false, or in reckless disregard of their truth or falsity- , and as part of this actual malice element, the publication be "of and concerning" the plaintiff. That is, that the depiction is meant to portray "in actual fact, the plaintiff acting as described," by the

fictional character. (A 67). As noted, *supra*, this holding is contrary to *Zacchini* and *Hustler Magazine*.

The Trial Court's JNOV required the malice elements of defamation cases by adding the elements of specific intent to profit and specific intent to harm Appellant.

The JNOV and the Appellate opinion also fail to follow, and are contrary to the three Missouri cases cited *supra*, in that it adds additional elements to the tort, contrary to the law, as stated in the Western District cases of *Munden*, *supra*, and *Haith*, and in this Court's decision in *Nemani*, *supra*.

Additionally, the slip opinion effectively abolishes those torts in Missouri. Clearly, misappropriation and right of publicity torts are not concerned with whether the publication speaks well of and lauds, or insults and denigrates the plaintiff. Under all the cases, the gravamen of the tort of the right of publicity is that the defendant used another person's name and identity for the defendant's advantage, such as to promote or market a product. It is a property right violation. *Munden* and *Haith*, *supra*. The damages authorized are the fair market value the Respondents would have to pay to use Appellant's identity, and any diminution of the commercial value of the identity caused by Respondents' use. (Slip op. A 51 citing the Restatement [Third] Unfair Competition §49 cmt.d.).

Under Missouri law as set forth in *Munden*, *supra* and *Haith*, *supra*, and under *Zacchini* and *Hustler Magazine*, *supra*, malice is not an element of this tort. It is a business tort - a property right tort - not a defamation tort, and the Missouri opinions specifically hold that "malice" comes into play only if punitive damages are submitted to a jury. *Munden*

v. Harris, 134 S.W.2d at 1079; *Haith* 704 S.W.2d at 687, and punitives were not submitted here.

All parties, and the Trial Court and the Appellate Court agree that the comic “Spawn” was not about Appellant or “of and concerning” Appellant. It did not suggest Appellant committed acts such as the namesake character committed. Spawn was the product Respondents were selling, and as a product, was unrelated to Appellant.

No case cited by the opinion holds that the product a defendant is marketing must be “of and concerning” the plaintiff. In the instant case, the promotional material for the product - McFarlane’s “Letters” column in the magazine and the Wizard publication clearly and admittedly specifically identified this Appellant. Those pieces specifically identified Appellant by name, identity and sports fame, and made the connection to the product - Spawn - by associating Appellant with his namesake in the comic strip. It ought to be obvious that, in order to use Appellant’s identity to help market Spawn, Respondents would have to identify Appellant and his fame in their promotional material, which they admittedly did.

Carson v. Here’s Johnny Portable Toilets, 698 F.2d 831 (6th Cir.) and *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), cited in the Appellate opinion support Appellant and are contrary to that opinion. In *Carson*, the defendant suggested a relationship between Johnny Carson and the defendant’s product by using the phrase “Here’s Johnny”, to promote defendant’s portable toilets. In *Midler*, the defendant used an imitated voice of Bette Midler to promote the sale of an unrelated product - Ford cars. In neither case was the product

being promoted “of and concerning” the plaintiffs, Carson or Midler. Of course, the promotional material, - “Here’s Johnny” and Midler’s imitated voice - were identified with the plaintiffs. Here, the comic strip Spawn was a product unrelated to Appellant, just as the toilets and cars were unrelated to those plaintiffs, and here, the promotional material - McFarlane’s columns and Wizard - clearly identified Appellant by name and fame, and boasted that, they, Respondents used this Appellant’s name for the fictional character, and reader would continue to see NHL players names in Respondent’s comics..

Cardtoons v. Major League Baseball Players Ass’n, 95 F.3d 959 (10th Cir. 1996) cited in the Slip opinion, illustrates the 1st Amendment law in defamation cases when the product is related to or is about the public figure, such a parody on the Plaintiff, or his business or sport, or an editorial or commentary on him or his sport or business. Here, the product - Spawn - is not related to Appellant, and, as such, *Cardtoons* is inapposite. In *Cardtoons*, the product was parody trading cards of Major League Baseball players, and contained their image or caricature, and received 1st Amendment protection because they were parodies and social commentaries on the wealth of professional athletes. As such, the parody trading cards were not unrelated to the baseball players - they were about those players and directly related to them. *Cardtoons* at 969. The cards were the product, and were not used to promote some other unrelated product. *Cardtoons* at 970. The cards directly related to the baseball players, and was a form of social commentary, much like an editorial or editorial cartoon, and therefore, were entitled to 1st Amendment protection.

If the Appellate opinion becomes the law, then the entire right of publicity cases with respect to any fictional product is abolished. Producers or others are free to use a digital image or the name of a celebrity; put out their “inspirational” promotional material, truthfully claiming the image or name is that of the famous person, such as Harrison Ford; label the unrelated product as fictional, and under the slip opinion here, the plaintiff, Harrison Ford or any other public person, has no cause of action, even though it is obvious the producer was using the celebrity’s name or image and identity for its advantage. That is not the current Missouri law and is not supported by U.S. Sup. Ct. cases or any cases cited in the Slip opinion, or in the JNOV.

Here, all agree that the Spawn comic strip was not a parody, *etc.* on Appellant or hockey. It was a product just as unrelated to Appellant as the toilets and cars were to Carson and Midler, and therefore not protected by the 1st Amendment, under *Zacchini*, *supra*, and *Falwell*, *supra*.

The opinion holds Respondents are excused because they were truthful in admitting McFarlane named the fictional characters after celebrities, including Appellant, and then the opinion speculates that McFarlane’s Spawning Ground columns and Wizard were just used to say what “inspired” McFarlane. No Respondent claimed those pieces were just “inspirational,” and no evidence supports that speculation. No case cited in the opinion holds a defendant is excused from paying for their use of Appellant’s name and identity to promote their product just because a defendant may say he was just “inspired” to do that. The evidence and the facts, as stated in the Appellate opinion and the JNOV, and common

sense support the realistic view, which is that McFarlane used Appellant's and other hockey players' names and identity to help market his product - Spawn. This is the "advantage" Respondent gained by using Appellant's name and professional identity in marketing their Spawn products.

Appellant submits that the Trial Court and the Appellate Court erred in holding the First Amendment applied to a right of publicity case and, based on that view, erred in holding Appellant failed to make a submissible case, and requests this Court to reverse the Trial Court's JNOV. Under Missouri law, the elements of the tort of wrongful appropriation are as follows: (1) the intentional use of the plaintiff's name, (2) any advantage derived from the use by the defendant, and (3) the plaintiff did not consent. *Haith v. Model Cities Health Corp. of Kansas City*, 704 S.W.2d 684, 687 (Mo. App. 1986). The Missouri Supreme Court recently reiterated the elements of the cause of action for invasion of privacy by the appropriation of a person's name or likeness, holding that it occurs when there is an "appropriation of plaintiff's name or likeness for defendant's advantage." *Nemani v. St. Louis University*, 33 S.W.3d 184, 185 [2] (Mo. banc 2000). Name appropriation occurs where a defendant "makes use of the name to pirate the plaintiff's identity for some advantage." *Nemani*, at 185 [3, 4], quoting from *Haith v. Model Cities Health Corp. of Kansas City*, 704 S.W.2d 684, 687 (Mo. App. 1986) and William M. Prosser, *Privacy* 48 Cal. L. Rev. 383 (1960). In *Nemani*, *supra* at 186 the Court cited with approval the seminal case on this tort in Missouri - *Munden v. Harris*, 134 S.W.2d 1076 (Mo. App. W.D. 1911), *Haith v. Model Cities*, *supra*; *Zacchini*, *supra* at 572 FN. 7.

The Trial and Appellate Courts erroneously viewed this case as if all the Respondents did was to name the Spawn character “Tony Twist.” (Trial Court’s Judgment A8, 15, and Slip op. A53). The slip opinion at A53 says same-names alone does not give rise to a claim “***,” and at footnote 10 on page 13 (A53) cites a string of cases for that proposition. If all the Respondents did was to name the Spawn character “Tony Twist, and no more, it might be doubtful whether Appellant would have a viable cause of action. All the cases filed in footnote 10, all the defendants did was to use a name that happened to be the same as the plaintiffs, as the name of a character in a comic strip or a TV show. The defendants in those cases did not make use of the plaintiff’s professional identity and fame in separate promotional material in order to market their comic strip or TV show, and in some instances, the issue was whether it was the plaintiff whose name was used, or if it was coincidental.

The instant case is not based on same nameness alone and no one contends any more, that the use of the name “Tony Twist” was just coincidental. Here, Respondents admittedly identified this Appellant as the famous hockey player they named the character after, AND, in separate promotional literature used his professional fame and identity to attract customers – hockey fans, kids and others – to their product – Spawn and Spawn products – other cases cited in footnote 10 are inappropriate.

The Trial and Appellate Courts erred in holding this right of publicity case was protected by the First Amendment, and this court should reverse the trial courts judgment.

Prior to and through the trial of this case, the trial court entered orders which defined the elements of Appellant's cause of action consistently with well established Missouri law found in *Munden v. Harris*, 134 S.W.2d 1076 (Mo. App. W.D. 1911); *Haith v. Model Cities Health Corp. of Kansas City*, 704 S.W.2d 684 (Mo. App. 1986); and *Nemani v. St. Louis University*, 33 S.W.3d 184 (Mo. banc 2000). The case was submitted to the jury on instructions consistent with Missouri law set forth in those cases.

This case was before the trial judge from its inception to conclusion. During its pendency the trial court ruled on several Respondents' Motions to Dismiss and Motions for Summary Judgment. Unlike most tort suits, the trial court here, in its pre-trial orders, declared the law the parties were to follow in the trial of the case.

On April 10, 2000, about three months prior to the trial, the trial court issued its order overruling Respondents motions for summary judgment, and explicitly set forth the law on this cause of action for the guidance of the parties. As to the governing law and elements of the tort, the trial court in this case stated:

The elements necessary to establish a cause of action for wrongful appropriation of name or likeness are: (1) The publication/use of Plaintiff's name or likeness, (2) the Defendants derived an advantage therefrom, and (3) The Plaintiff did not consent to the publication/use. *Haith v. Model Cities Health Corp.*, 704 S.W.2d 684 (Mo. App. W.D. 1986).

(LF 1082).

At the time this case was tried, the Mo. App. E.D. had decided *Nemani v. St. Louis University* and the trial court used it for guidance. The Mo. App. E.D. slip opinion in *Nemani* is at A 41 to 75. This Court had not yet decided *Nemani*. Subsequently, this Court reversed *Nemani*, but did so solely on the ground that *Nemani's* consented to St. Louis University's use of his name but reaffirmed the elements citing *Haith* and *Munden*, with approval.. *Nemani vs. St. Louis University*, 33 S.W.3rd 184 (Mo. Banc. 2000). In that same April 10, 2000 Order, the trial court cited the E.D. Court of Appeals' Opinion in *Nemani v. St. Louis University* saying:

There seems little doubt that a misappropriation claim requires proof only that the Defendant derived an advantage from the publication, in order for the tort of misappropriation to stand.

(Emphasis supplied). (LF 1086).

The trial court then incorporated those essential elements in the appellant's verdict directing instruction No. 6, as to Respondent McFarlane, and in identical instructions 8, 10, 12 and 14 as to each of the other Respondents. Instruction 6 is set forth at A 76 (LF 1256).

The authority appearing on the copies of this instruction, since there was no MAI to use, is *Haith v. Model Cities Health Corporation*, 704 S.W.2d 684 (Mo. App. W.D. 1986). In the instructions conference when the Court decided to give Instruction No. 6, the Court stated:

The Court will give as Instruction No. 6, the Plaintiff's Verdict Director, premised on this Court's previous Orders in *Haith v. Model Cities Health Corp.* This is a not in MAI instruction.

(T 1111) (Emphasis added). Thus it is clear that the Appellant diligently complied with the trial court's Orders as to the law of this case, and the elements of the cause of action, as set forth by the trial court from *Haith* and later reaffirmed in *Nemani*, by this court.

About four months after the jury verdict of July 5, 2000, the trial court on October 31, 2000, rendered its "Memorandum, Order and Judgment" granting Respondent's JNOV, (A1-21) which resulted from the trial court changing its mind as to the elements of the tort, and then holding, under the Court's re-definition, that Appellants failed to make a submissible case.

The trial court erred in adding those additional elements and its judgment should be reversed.

When the trial court misinterprets the applicable law, this Court will apply the correct law and reverse. *Mo-Kan Teamsters Fund v. Clark*, 803 S.W.2d 61,63 (Mo. App. W.D. 1990). In *Hatch v. V.P. Fair Foundation, Inc.*, 990 S.W.2d 126, 136 (Mo. App. E.D. 1999), the Appellate Court reversed the trial court's JNOV, holding, *inter alia*, that the trial court misinterpreted Missouri law on collateral negligence.

In the instant case the trial court misinterpreted the Missouri law on wrongful appropriation of name, and consequently misapplied it. Appellant prays this court to apply the established Missouri law, as set forth supra, and reverse the trial court's JNOV.

(B.)

**THE COURT ERRED IN HOLDING THE EVIDENCE
WAS INSUFFICIENT FOR THE JURY TO FIND
RESPONDENTS INTENTIONALLY APPROPRIATED
APPELLANT'S NAME TO RESPONDENTS'
ADVANTAGE OR TO APPELLANT'S DETRIMENT,
WITHOUT APPELLANT'S CONSENT IN THAT THE
EVIDENCE DID SUPPORT A JURY FINDING THAT
RESPONDENTS DID APPROPRIATE APPELLANT'S
NAME WITHOUT HIS CONSENT AND TO THEIR
ADVANTAGE AND TO THE DETRIMENT OF
APPELLANT.**

Appellant made a submissible case under Missouri law which declares the elements of this cause of action to be that Respondents (1) used or published Appellant's name or likeness, (2) the Respondents derived an advantage, and (3) Appellant did not consent to the use of his name by Respondents. *Haith v. Model Cities, supra*, 704 S.W.2d at 687; *Nemani v. St. Louis University*, 33 S.W.3rd 184,185 (Mo. banc 2000); *Munden v. Harris*, 134 S.W.1076 (Mo. App. W.D.1911).

In this part of our Brief we will make several references to the trial court's JNOV, entitled "Memorandum, Order and Judgment" of October 31, 2000. (LF 1386-1406, and Appendix pages A1-A21), in order to address the adverse findings by the trial court.

1. Intentional Appropriation of Appellant's Name to Respondents' Advantage.

The evidence admitted at trial was overwhelming that Respondents intentionally appropriated **this** Appellant's name in Spawn products, and is set forth at length in the Statement of Facts. Even the trial court agreed "that defendant McFarlane intentionally used the name of the plaintiff..." (LF 1392; Appendix A7). And the Appellate opinion agreed that Respondents intentionally used this Appellant's name. (Slip Op. A 43-44)

In ruling on the issue of whether a plaintiff made a submissible case, the Court will view the evidence in the light most favorable to the plaintiff and the verdict, and disregard defendant's evidence and inferences to the contrary. It is only where "all the evidence and reasonable inferences drawn therefrom are so strongly against the plaintiff's case that there is no room for reasonable minds to differ" will a court affirm a JNOV. *Hatch v. V.P. Fair Foundations, supra*, 990 S.W.2d 126 at 135. "A presumption exists favoring the reversal of a motion for judgment notwithstanding the verdict." *Layton et al. v. Baris*, 43 S.W.3d 390, 393 (Mo. App. E.D. 2001). (See Standard of Review, *supra*).

After appropriating Appellant's name as the name of the fictional character in Spawn, Respondents published McFarlane's fan letters column called "Spawning Ground", which is separate from the comic strip itself. There, McFarlane explicitly made the connection

between Appellant and the Spawn product, to the anticipated pleasure of the Spawn hockey fans. In September 1994, McFarlane wrote in his column that he is a big hockey fan and claimed to name a lot of his characters after NHL players, giving as an example:

Antonio Twistelli a/k/a Tony Twist, is actually the name of a hockey player of the Quebec Nordiques. (Group Ex. 16, Issue 24).

In another fan letter column, McFarlane, after acknowledging the use of hockey players' names, and particularly Tony Twist's name, enticed the readers by promising "***you will continue to see current and past hockey players' names in my books." (Ex. 16, Issue 20).

And then Wizard Magazine, acting on the information supplied by McFarlane about his using Appellant's name, published a photo of Appellant in his St. Louis Blues uniform and one of the fictional Tony Twist, and identified him as the NHL St. Louis Blues Right Winger, and stated the Mafio don ("Tony Twist") is named for former Quebec Nordiques player Tony Twist, "now a renowned enforcer for the St. Louis Blues of the National Hockey League. (Ex. 1; A38).

All of this made the promotional or marketing connection between Appellant, and his identity as a famous professional hockey player, and Respondents' product "Spawn" and related products. "Advertising" is "drawing the public's attention to something to promote its sale". (Black's Law Dictionary, 7th Ed. p. 55). And that is what the evidence showed Respondents did.

And as noted *supra*, McFarlane used his letters column, after claiming the use of this Appellant's name, to assure his readers they would continue to see hockey players' names in his publications, - as an inducement to buy Spawn, by drawing the readers' attention to Appellant and his hockey identity. Surely this evidence was sufficient to permit a jury to find Respondents used Appellant's name and professional hockey celebrity status to "derive an advantage" in marketing their product.

**(a) Missouri Law only Requires that Respondents
Derived Any Advantage.**

The court in *Haith* left no doubt that any advantage to the defendant would be sufficient for the jury to find liability for wrongful appropriation of name and identity.

Haith, 704 S.W.2d at 688. The court stated,

Defendant says that mention of plaintiffs' names in the grant application constituted an incidental business use and therefore was not a commercial appropriation. ***. The argument ignores that a jury could find that there was an advantage to defendant in using plaintiffs' names to procure a government grant...

Id. *Haith* was reaffirmed by this court in *Nemani, supra*, 33 S.W.3d at 185 where the opinion says, "Name appropriation occurs where a defendant makes use of a name to pirate the plaintiff's identity for some advantage." (emphasis added).

**(b) The Evidence Showed that All Respondents
Received a Pecuniary Advantage from Their
Intentional Use of Appellant's Name.**

The evidence of the advantage derived by Respondents from their use of Appellant's name is more fully set forth supra in the Statement of Facts and Summary. Appellant has been a professional hockey player in the NHL for three years prior to Respondent's first use of his name. (T 315 and T 797). McFarlane acknowledged that Appellant had a fan base. (T 851). Appellant expended substantial time and effort to develop and expand his fan base. Appellant's primary fan base was among hockey fans and kids. In an interview appearing at the end of the HBO Spawn animated series, McFarlane admitted that he intentionally markets Respondents' products to kids. (Exhibit 23 and T 860). Respondents purpose of marketing to kids is to sell more Spawn products. (McFarlane, Vol. I, 251). Respondents intentionally and extensively marketed their products to hockey fans. Respondents marketed their products to hockey fans to increase revenues. (McFarlane Vol. I, page 291). Respondents trademarked their use of Appellant's name. (Cunningham 108-109). That meant that Respondents believed that the name Tony Twist had value (Cunningham 111).

McFarlane also claimed the connection between the name used in Spawn products and Appellant, thereby deriving an advantage from the use. When fans of Spawn wrote to McFarlane and pointed out the connection between the name used and Appellant, McFarlane not only affirmatively acknowledged the connection, but claimed it. (Exhibit

16, Spawn Issues 20 and 24). McFarlane also claimed the connection in response to Scott Beatty's questions for the Spawn Wizard Tribute. McFarlane's own statement was that whenever he chooses a name, "I try to have a little bit of play on it - - I am a big hockey fan, and a lot of my characters have been named after current NHL hockey players. For example, Antonio Twistelli a/k/a - which means also known as - Tony Twist, is actually the name of a hockey player for the Quebec Nordiques." (T 928). This evidence, that Respondents used NHL hockey players names, already evidences an intent by Respondent to use hockey player names for their advantage to market Spawn and Spawn products. Some of the "play" he benefitted from was by actually marketing Spawn and its products to hockey fans and kids, and using Appellant's name to make Spawn more appealing to them. (T 133). Finally, McFarlane admits that everything he does is designed toward marketing Spawn and Spawn products to the public (McFarlane Vol. 1, p. 251).

The evidence described above was more than sufficient to permit a jury to find Respondents an advantage from their use of Appellant's name. However, in addition, Appellant's experts, Dr. Till and Rocky Arceneaux testified that Respondents derived a pecuniary advantage from their use of Appellant's name. (T 136 and Arceneaux 26). Dr. Till and Arceneaux's testimony, qualifications and opinions are more fully set forth under Point II E of this brief, *infra*.

**2. The Evidence Showed that Respondent's Use of
Appellant's Name was to Appellant's Detriment.**

The evidence at trial showed Respondents' use of Appellant's name was to Appellant's detriment, as set forth in the Statement of Facts and Summary. In short, Appellant lost a \$100,000.00 per year endorsement contract with Experimental Applied Science Co., when Sean Phillips withdrew the offer after seeing the use of Appellant's name and identity in Spawn by Respondents. That evidence was uncontroverted. More significantly, as to damages, is the evidence that his endorsement value was significantly diminished, as testified to by Dr. Till and Mr. Arceneaux.

**3. The Evidence Showed that Appellant did not
Consent to Respondents' Use of his Name.**

The final element of Appellant's cause of action was that he did not consent to the use. *See Haith, Nemani and Munden, supra*. Appellant testified that he did not consent to the use and there was no evidence or even argument to the contrary from Respondents. (T 319). In fact, McFarlane admitted that he did not have Appellant's consent. (T 742).

**4. The Trial Court Supported its JNOV by
Disregarding the Substantial Evidence Heard by the
Jury, Sometimes Making Findings not Supported by
the Evidence and Other Times Basing his Decision
on Conclusions Which are Irrelevant to the Tort of
Wrongful Appropriation of Name or Right of
Publicity Under Missouri Law.**

The trial court undertook to support its JNOV by downplaying the evidence and sometimes making findings not supported by the evidence. Appellant has set forth below some of the trial court's findings which disregard the evidence or were not supported by the evidence and descriptions of the actual evidence that was received at trial.

The trial court described Appellant, as an "obscure hockey player with the also-ran Quebec Nordiques." (LF 1389, Appendix at A4). The trial court, in its final judgment, said when McFarlane first used Twist's name, Appellant had no market recognition and was earning zero income from endorsements. (LF 1393, Appendix at A8). It opined that "when McFarlane christened the *Mafia* character plaintiff Tony Twist was unknown to the general public. Even at the height of his own fame, plaintiff was known at best to people in St. Louis and hockey fans elsewhere." (LF 1394, Appendix at A9.) (emphasis in original) Finally, the trial court said that "prior to the litigation only three members of the public ever connected plaintiff with the fictional *Mafioso* in 'Spawn'. One of these was plaintiff's mother and another a boy who got the idea from a publication independent of 'Spawn' itself. The third person aware of the connection was Sean Phillips, who purportedly offered plaintiff an opportunity to secure an endorsement contract with a nutrition supplement marketer, EAS." (LF 1394, Appendix at A9). (emphasis in original). As set forth below, each of these statements made by the trial court are incorrect and not supported by the evidence.

No evidence supported that characterization of the Nordiques as an "also-ran" team. At that time it was one of only 24 NHL teams in all of the USA and Canada, and located in

Canada where hockey is the national sport. (T 323, 324). Nor does the evidence support the characterization of Appellant as an "obscure hockey player". The evidence is that he was drafted by the St. Louis Blues in 1988; played 28 games with the Blues, and on his arrival in Quebec he was "big news", and he was extensively covered in the press, (T 323, 324), and appeared on TV or radio interviews in all 24 or 26 NHL cities. (T 324). Appellant was extensively covered in the press when he first was drafted by the Blues and came to St. Louis, and continuing through his time with the Quebec Nordiques and his return to the Blues. (T 323-324).

There was no evidence that Appellant had no market recognition. To the contrary, Appellant had received significant publicity in Quebec and the U.S. NHL cities as an outstanding hockey player.

The evidence contradicted the trial court's opinion that "when McFarlane christened the *Mafia* plaintiff Tony Twist was unknown to the general public. Even at the height of his own fame, plaintiff was known at best to people in St. Louis and hockey fans elsewhere." (LF 1394, Appendix at A9). In 1993 when Spawn used Appellant's name, Appellant was already receiving extensive press coverage in Quebec and in all the 24 NHL cities in the U.S. and Canada; and, of course, in St. Louis, where he had played. (T 323, 324). The trial court, apparently, could not avoid acknowledging that he was known to "hockey fans elsewhere." Where is "elsewhere"? It's all over the U.S. and Canada - wherever NHL teams play!!!

The trial court's statement that "prior to the litigation only three members of the public ever connected plaintiff with the fictional Mafioso in 'Spawn'" is not correct. (LF 1394, Appendix at A9). His mother noted the connection when some boys came to her house with a card showing Tony Twist, asking for her son's autograph. (T 352-355). And yes, another boy had a copy of the Wizard Spawn Tribute showing a picture of the Mafioso character and a photo of Appellant, containing the information McFarlane gave out that the Mafioso character was named after the Appellant, formerly with the Nordiques and now a renowned enforcer with the St. Louis Blues of the National Hockey League.

But what the Trial Court totally ignored was the testimony and exhibits which showed that McFarlane himself knew of Appellant and, because Appellant was an NHL player, used his name. Additionally, McFarlane had told the whole comic fan world that Tony Twist was named after Tony Twist, an NHL, every time he had the opportunity to do so. McFarlane claimed that connection in Spawn Issues 20 and 24, where McFarlane said he named the character after Appellant and identified Appellant as an NHL hockey player in response to letters where fans noted that Quebec Nordiques were characters in Spawn. (Ex. 16). As those letters show, McFarlane's fans recognized the relationship between the Tony Twist character and Appellant. McFarlane did it again in Wizard Spawn Tribute and got it across to all the people who bought that publication. (Exhibit 1; Appendix at A35-40). McFarlane himself advertised and claimed the associations to the general public, and used it to promote Spawn and Spawn products. Contrary to the trial court's viewpoint that only three people connected Appellant with Spawn, McFarlane himself made that "connection" in

his own publication of Spawn, and in Wizard Spawn Tribute, and promulgated it to the whole comic book fan world.

In addition to showing that the trial court was mistaken on the facts, each of the statements by the trial court set forth above also show that it was mistaken on the law. Each of the statements suggest the Appellant needed to show that he had made some valuable use of his name prior to its misappropriation by Respondents in order to prevail on his cause of action for wrongful appropriation of name. Missouri law is exactly the opposite. *Munden v. Harris*, *supra* 134 S.W. at 1078, holds that a person is not compelled to show that he used or intended to use any right he has in order to determine whether it is a valuable property right of which he cannot be deprived, and in which the law will protect him. In *Munden*, the court further held, at 134 S.W. at 1078, that, "The privilege and capacity to exercise a right - **though unexercised, is a thing of value - is property** - of which one cannot be despoiled." Therefore, the trial court's statements and conclusions regarding the value of Appellant's name prior to Respondents wrongful appropriation is totally irrelevant to whether Appellant established his cause of action.

Additionally, however, the evidence was clear that Appellant had developed a value to his name and identity as he had been paid to endorse products, and that is not controverted.

But the trial court's mistaken denigration of witnesses and evidence in order to support its JNOV does not stop there. The court in its JNOV addressed the evidence on damages, saying:

Speaking of evidence, the Court is fain to observe that it has seldom seen less credible evidence than that presented on damages by plaintiff. The witness Sean Phillips, who **purportedly** aborted plaintiff's potential endorsement contract because of the "Spawn" connection, was wholly unbelievable. **Prior to the proposed contract** with Twist, Phillips' company, **EAS, had never entered into a contract for more than \$10,000 with any celebrity endorser.** Phillips and plaintiff were personal friends. **Phillips was not an executive officer of EAS at the time the supposed endorsement contract** was bruited, and **nobody else was in the company hierarchy had any inkling that such a contract was in the works.** See Bellamy depo at 57. At the time this supposed contract was being negotiated, plaintiff's hockey career had been interrupted by a severe injury, probably disabling him from professional hockey in the future. Finally, **the evidence of this supposed contract first came to light on the every eve of trial."**

Appendix at A10, A12; LF 1395-1396). (Emphasis supplied). First of all, the credibility of the testimony of Sean Phillips was for the jury to determine. It was not for the judge to assess. "For the jury is the sole judges of the facts, and the credibility of the witnesses is

for them to determine." *Waters v. Bankers Life Assurance Association*, 50 S.W.2d 183, 188 (Mo. App. W.D. 1932); *Mo-Kan Teamsters Fund v. Clark*, 803 S.W.2d 61, 63 Ft.N.1(Mo. App. W.D. 1990).

Appellant will now address each assertion the trial court made regarding Sean Phillips and show that those assertions have no evidentiary support, and that they are contrary to the evidence.

The trial court said Sean Phillips who "purportedly" aborted Appellant's endorsement contract because of the Spawn connection was wholly unbelievable. Sean Phillips was a fact witness and his credibility was for the jury - not the judge. *Waters, supra*, 50 S.W.2d at 188. Phillips did not "purportedly" abort the contract. He did abort it. (Phillips 14, 17). Phillips was the **final decision maker** on that. (Phillips 78, 79; Bellamy 80).

Sean Phillips and his brother Bill founded Experimental Applied Science Co., which is EAS, in 1994. (Phillips 6). It is in the sports nutrition business, (Phillips 6). **Sean was executive vice president from the beginning of EAS, (Phillips 6), and continued in that position until December 1, 1999.** (Phillips 84). EAS is the largest of the sports nutrition companies with a gross revenue of \$162,000,000.00 through the end of 1999. (Phillips 6). At EAS his responsibility and focus was athlete relations and management to find new talent and procure them for "Team EAS." (Phillips 8). Phillips knew Appellant and thought his rapport with people; his ability to conduct an interview; his performance on camera; and his leadership abilities were exceptional. Twist had a high degree of

knowledge in the area of sports nutrition, which was critical and important to EAS. (Phillips 9).

In September 1999, Phillips offered Appellant an endorsement contract with EAS at \$100,000.00 per year (Phillips 9,81). During that conversation Appellant candidly brought up the issue of Spawn and Phillips requested more information on it. (Phillips 11-12). Twist sent him the Spawn video; Wizard Spawn Tribute and other Spawn information. (Phillips 12-13). He viewed the video and read the articles, and concluded that the Spawn/Tony Twist connection depicted there had such a negative connotation and that Appellant was unacceptable to EAS as an endorser of their product. (Phillips 14,15). Phillips then withdrew the offer and did so solely because of "the negative connotations" that Appellant's association with Spawn would have on EAS products. (Phillips 17).

Phillips was the final decision maker on endorsement contracts he negotiated, and the final written contract would be signed by Phillips or the general counsel. (Phillips 78,79). Phillips had the authority to bind EAS to an endorsement agreement, (Phillips 83). During the meetings with Appellant, two other EAS persons were present - Mike Parisi and Tim Grover. (Phillips 42). The only reason Phillips did not do business with Appellant was the negative connotations from Spawn and that would not fly with what EAS stands for. (Phillips 53). At that time, September 1999, Appellant was in a brace and on crutches from a motorcycle accident a few weeks earlier. (Phillips 15). That made no difference because Phillips saw a real opportunity for EAS nutrition company to get him back on the ice. "It was a real - - actually an unfortunate accident but a unique opportunity." (Phillips 16).

The **Respondent's** witness Earl Bellamy, general counsel for EAS, testified that: (1) **Phillips was executive vice president of EAS up to the end of November 1999.** (Bellamy 20); (2) Phillips had the authority to negotiate with potential athlete endorsers. (Bellamy 27). **Five or six athletes had endorsement contracts for \$100,000.0 per year or more with EAS.** (Bellamy 44). (3) Phillips had the authority to sign endorsement contracts (Bellamy 90) and Phillips had done that earlier (Bellamy 89). Bellamy does not participate in the contract negotiations, (Bellamy 17), and is not the decision maker on whether or not to enter into a contract. (Bellamy 16). Mike Parisi was employed by EAS and is now actively involved with negotiating athlete endorsements contracts. (Bellamy 23). Bellamy was **not surprised** to learn that Phillips had been negotiating with Appellant nor that Phillips had offered Appellant \$100,000.00. (Bellamy 68, 69). Phillips was an officer of EAS up until he left the company at the end of November 1999. (Bellamy 76). **Phillips had the legal authority to sign endorsement contracts for EAS without talking to anyone else at EAS in the August/September 1999 time frame.** (Bellamy 90). Bellamy was not involved in endorsement contracts until Phillips came to him to prepare the paperwork. (Bellamy 79). If Phillips decided not to enter into an endorsement contract with an athlete, the matter would never even get to Bellamy, (Bellamy 79), and Phillips' decision was final. (Bellamy 80). Bellamy does not engage in correspondence with either an athlete or his agent. (Bellamy 87). Bellamy testified that if Phillips testified that he, Phillips, had negotiated with Appellant in 1999 for an endorsement contract, he Bellamy,

would not question that statement. (Bellamy 86, 87). And Phillips did so testify. (Phillips 8, 9, 14).

The trial court also opined or found, that at the time the endorsement contract was "bruited", no one else in the company hierarchy had any "inkling" such a contract was in the works, and cited Bellamy demo at 57. (LF 1395; Appendix at A10.) Going on, the court said, "At the time the supposed contract was being negotiated, plaintiff's hockey career had been interrupted by a severe injury, probably disabling him from professional hockey in the future. Finally, the evidence of this supposed contract first came to light on the very eve of trial." First, all the Bellamy deposition at page 57 said is that no one at EAS **told Bellamy** that EAS was in negotiations with Tony Twist. (Bellamy 57). Bellamy **did not** testify that no one else at EAS had any "inkling" the contract was in the works, at page 57 or at any other time. **Bellamy also testified that he had no reason to doubt that Phillips was negotiating with Twist in September 1999**, and that if Phillips decided not to enter the contract, it would never get to Bellamy. (Bellamy 79, 80). Also, two other EAS people were with Phillips when he met with Twist. (Phillips 42). The trial court had no basis for making that finding as it was contradicted by the evidence. Second, the court said Twist's hockey career had been interrupted by the injury, as if that was of concern with regard to the endorsement contract. No evidence of that. In fact, Phillips testified he saw that as a great opportunity for EAS, (Phillips 16), and there were no conditions requiring Twist to play hockey again. (Phillips 77, 78). In fact, EAS had renewed the contract of NFL football player Terrell Davis after he had a major knee injury and was in rehabilitation.

(Bellamy 82-83). Third, the court said evidence of this "supposed" contract finally came to light on the "very eve of trial". No evidence of that. Phillips testified in his deposition to those negotiations, when Respondents took his deposition on April 5, 2000, some three months before trial. Bellamy's deposition was taken by Respondents May 24, 2000 and the matter was addressed.

In conclusion, as to the jury verdict aspect, *Nooney Krombach Co. v. Blue Cross, et al.*, 929 S.W.2d 888, 895 (Mo. App. E.D. 1996), reversed the trial court's JNOV and reinstated the verdict for plaintiff. The court said, "There is no presumption of correctness of any factual determination by the trial court in granting judgment notwithstanding the verdict. If there is substantial evidence of all essential elements of a claim the jury has the sole authority to determine the facts."

As demonstrated above, the trial court erred in granting JNOV. In *Nooney Krombach, supra* the court said; "We state the facts the jury could have found in support of its verdict and explicate the inferences it might have drawn from those facts, without discussion of contrary evidence and other possible inferences." *Nooney Krombach, supra* at 890. In the instant case the trial court did the opposite of what is required by *Nooney Krombach, supra* and not only drew inferences contrary to the evidence, but made specific findings wholly unsupported by the evidence, and contrary to the direct evidence in the case. The evidence demonstrates the trial court's findings are contrary to the evidence and unsupported by any evidence. This Court should reverse the trial court's judgment and reinstate the verdict..

(C.)

**THE COURT ERRED IN HOLDING THAT THE EVIDENCE
WAS INSUFFICIENT TO MAKE A SUBMISSIBLE CASE
EVEN UNDER THE COURT'S RE-DEFINITION OF THE
ELEMENTS OF THE TORT OF WRONGFUL
APPROPRIATION OF APPELLANT'S NAME BECAUSE
THE EVIDENCE DID SUPPORT A JURY FINDING IN
FAVOR OF APPELLANT.**

Even were the Court to assume, *arguendo*, that the trial court's added requirements for the cause of action for wrongful appropriation was correct, Appellant made a submissible case under that standard and therefore JNOV was erroneous. In its JNOV Order, the trial court added a requirement, in contravention of Missouri law and *Zacchini, supra* and *Falwell, supra*, that Appellant show that Respondents specifically intended to either harm Appellant or specifically intended to derive an economic benefit from the use. (LF 1399; Appendix at A14). There was substantial evidence at trial that Respondents specifically intended to derive economic benefit from their use of his name. Appellant will set forth that evidence below.

There was substantial evidence that Respondents intended to harm Appellant by their use of his name. Respondent McFarlane testified that at the time he decided to use Appellant's name, and at the time he decided to use it in the HBO Spawn animated series, that he knew that Appellant was a NHL hockey player. (T 847-850). As set forth above, Respondent McFarlane's position with each Respondent makes his actions and knowledge

attributable to each Respondent. Respondent McFarlane further knew, and had known for at least ten years, that NHL hockey players like Appellant make money from endorsing products. (T 849-850). He also knew that many people, mothers, priests and rabbis to name a few, found his comics to be distasteful and objectionable. (T 854-856). Surely, from that evidence, the jury could have concluded that Respondents intended to injure the marketability of Appellant's name, or knew it would harm Appellant, but did it in total disregard for the adverse consequences to Appellant.. Finally, Respondent McFarlane had a stated dislike for the role, "enforcer", which Appellant fulfilled as a hockey player. (T 883). McFarlane first made this dislike known after the lawsuit was filed and at a time that he was a part owner of an NHL franchise. (T 883). From that evidence, the jury could have reasonably concluded that Respondents intended to harm Appellant's value as an endorser of products when they chose to use his name in their products, or acted in total disregard of whether Appellant would be harmed.

There was substantial evidence at trial that Respondents intended to profit from their use of Appellant's name. The evidence showed that Respondent McFarlane intentionally chose to use the name "Tony Twist" knowing that it was the name of an NHL hockey player. (T 803; Exhibit 16, issues 20 and 24). Respondent McFarlane then testified that everything he did with respect to Spawn was done with the intent to increase sales. (McFarlane, Vol. 1, p. 251). Commission of a tort for profit is sufficient grounds to show intent to cause harm. *Carpenter v. Chrysler Corp.*, 853 S.W.2d 346, 364 (Mo. App. E.D. 1993). The fact that McFarlane intentionally chose Appellant's name, knowing that it was Appellant's name, and that he admits

that everything he does is to increase sales of all Spawn products, and therefore profits, is enough for the jury to have concluded that Respondents intended to have a marketing advantage from their use of Appellant's name and identity. However, the evidence did not end there, Appellant introduced evidence that Respondents intentionally marketed their products to the same fans, hockey fans and children, Appellant's core fan base, as set forth in the Statement of Facts and Summary of Evidence. McFarlane admitted as much. (T 134, 135, 791, 793-794, 860; Exhibit 23).

Dr. Till testified that Respondents use of Appellant's name worked as part of a sophisticated marketing technique that created an association between Spawn and Appellant in the minds of consumers, as set forth supra. From these facts, the jury could have reasonably concluded that Respondents intended to profit or have an advantage from their use of Appellant's name and therefore, the trial court's grant of JNOV on the basis that Appellant failed to prove that Respondents intended to profit from their use of Appellant's name was in error.

The evidence was sufficient to make a submissible case even under the trial court's re-definition of the elements. The appellant requests this Court to reverse the trial court's judgment and reinstate the verdict.

II.

**THE COURT'S ORDER GRANTING A NEW TRIAL WAS
ERROR IN THAT:**

**(A) IT REQUIRED THAT THE VERDICT
DIRECTING INSTRUCTIONS, INSTRUCTIONS 6, 8, 10 AND
12, SHOULD HAVE INCLUDED A REQUIREMENT THAT
THE JURY FIND THAT RESPONDENTS SPECIFICALLY
INTENDED TO USE APPELLANT'S NAME FOR THEIR
ECONOMIC BENEFIT OR SPECIFICALLY INTENDED TO
INJURE APPELLANT'S MARKETABILITY OF HIS NAME
BECAUSE THESE ELEMENTS ARE NOT REQUIRED FOR
WRONGFUL APPROPRIATION AND NOT REQUIRED TO
BE IN VERDICT DIRECTING INSTRUCTIONS;**

**(B) IT REQUIRED THE JURY TO BE
INSTRUCTED THAT APPELLANT WAS REQUIRED TO
SHOW AN APPROPRIATION OF THE "COMMERCIAL
VALUE" OF APPELLANT'S NAME, BECAUSE MISSOURI
LAW SPECIFICALLY REJECTS A REQUIREMENT THAT
APPELLANT SHOW AN APPROPRIATION OF THE
"COMMERCIAL VALUE" OF APPELLANT'S NAME;**

(C) IT HELD THAT THE DISJUNCTIVE SUBMISSION IN THE VERDICT DIRECTING INSTRUCTION WAS INCORRECT IN THAT THERE WAS NO EVIDENCE OF ADVANTAGE TO RESPONDENTS FROM THEIR USE OF APPELLANT'S NAME, BECAUSE THERE WAS SUBSTANTIAL EVIDENCE OF ADVANTAGE TO RESPONDENTS FROM THEIR USE OF APPELLANT'S NAME;

(D) IT HELD THAT THE INSTRUCTIONS GIVEN TO THE JURY ON DAMAGES, NAMELY INSTRUCTION NO.16, WAS INCORRECT BECAUSE IT FAILED TO LIMIT THE DAMAGES AS TO EACH RESPONDENT TO THE AMOUNT OF BENEFIT EACH RECEIVED FROM THEIR USE OF APPELLANT'S NAME, BECAUSE THE INSTRUCTIONS GIVEN TO THE JURY REGARDING DAMAGES WERE CORRECT, AND RESPONDENTS WERE JOINTLY AND SEVERALLY LIABLE, AND INSTRUCTION NO. 16 IS MAI 4.01;

(E) IT HELD THAT THE TESTIMONY OF APPELLANT'S EXPERTS DR. TILL AND ARCENE AUX ON THE ISSUE OF DAMAGES, SHOULD HAVE BEEN

EXCLUDED, BECAUSE THERE WAS A PROPER FOUNDATION FOR THE TESTIMONY OF DR. TILL AND ARCENEUX; THEIR TESTIMONY WAS PROPERLY ADMITTED AT TRIAL; AND RESPONDENTS DID NOT PRESERVE THEIR OBJECTIONS TO THE EVIDENCE AT TRIAL; AND

(F) IT HELD THAT THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE, BECAUSE THERE WAS OVERWHELMING EVIDENCE IN SUPPORT OF THE VERDICT AND THE TRIAL COURT'S JUDGMENT STATED SPECIFIC GROUNDS AS THE BASIS FOR THE AGAINST THE WEIGHT OF THE EVIDENCE ORDER, AND IS THEREFORE NOT A DISCRETIONARY RULING.

A.

In its final judgment, the trial court indicated that one of the reasons it would grant a new trial, if the JNOV were reversed, was that it believed that Appellant's cause of action for wrongful appropriation of name required a showing of specific intent to either use the name for economic benefit or specific harm to injure the plaintiff. (Appendix at A16; LF 1401). That view was based on U.S. Supreme Court defamation cases and was erroneous, as we have shown supra. This led the court to conclude that the verdict directing instructions, Instructions

6, 8, 10 and 12, were in error. *Id.* Instructions 6, 8, 10 and 12 were identical except for the names of Respondents. Instruction Number 6 was as follows:

Instruction No. 6

Your verdict must be for Plaintiff and against Defendant Todd McFarlane if you believe:

First, Defendant Todd McFarlane intentionally used or published Plaintiff's name, and

Second, Defendant Todd McFarlane derived advantage from the use or publication of Plaintiff's name, or Plaintiff suffered harm as a result of Defendant Todd McFarlane's use or publication of Plaintiff's name, and

Third, Plaintiff did not consent to the use or publication, and

Fourth, as a direct result thereof, Plaintiff sustained damage. (LF.

1249 and A76)

In the instruction conference, when the court decided to give instruction No. 6, the court stated:

The Court will give as instruction No. 6, the Plaintiff's Verdict

Director, premised on this Court's previous Order in *Haith v.*

Model Cities Health Corp. This is a not in MAI instruction.

(T. 1111, emphasis added).

It also led the trial court to conclude that it should have given Respondents' proffered instructions D, E, F and G (LF 1273-1276), because they included the requirement of a finding of the specific intents and "were more nearly correct." (Appendix at A16, 17-20, LF 1401-1402) Instructions D, E, F and G are identical except for the names of the particular Respondent. Instruction No. D is as follows: (A78, LF 1273).

Instruction Number D

Your verdict must be for Plaintiff and against Defendant Todd McFarlane if you believe:

First, Defendant Todd McFarlane intentionally used Plaintiff's name and likeness in the comic books and animated television show Spawn for a commercial purpose;

Second, Defendant Todd McFarlane intentionally used Plaintiff's name and likeness in the comic books and animated television show Spawn for the purpose of advancing his economic benefit;

Third, as a direct result of the intentional use by Defendant Todd McFarlane of Plaintiff's name and likeness in the comic book and animated television show Spawn Defendant Todd McFarlane:

(a) derived actual economic benefit in the form of increased sales of comic books and animated television show; or (b) caused Plaintiff direct economic loss;

Fourth, as a direct result thereof, Plaintiff sustained damage.

The requirement for specific intent is one of the exact same reasons the trial court gave for granting the JNOV. As set forth supra, the trial court was incorrect regarding Missouri's law on the elements of the tort of wrongful appropriation of name and under the U.S. Supreme Court cases cited supra. Appellant has previously stated his explanation of the trial court's error. Therefore, the trial court erred, as a matter of law, in granting a new trial on the grounds of requiring specific intent, and did not err in giving Instructions 6, 8, 10 and 12, which do not require the specific intents amounting to malice as would be required if this were a defamation case such as *Falwell, supra.* And for the same reason, did not err in refusing Instructions D, E, F and G, which require the specific intents equating with malice.

Additionally, instructions D, E, F and G were incorrect. They require a finding that Respondents used Appellant's "name and **likeness**" in the comic books and TV show Spawn for a commercial purpose. Missouri law does not require that Respondents use both Appellant's name AND likeness. It is name OR likeness, and Respondents did not use Appellant's **likeness** in Spawn or in the TV shows. Missouri law does not require a "commercial purpose." The instruction limited the Respondents' use of Appellant's name and likeness to the Spawn comic and TV shows. The evidence showed Respondents used Appellant's name and identity in McFarlane's letters column and in Wizard Spawn Tribute (A38). Instruction D required a finding that Respondents derived an "actual economic benefit in the form of increased sales of comic books and animated TV show, or caused Appellant direct economic loss." Again, Missouri law does not limit the "advantage" to actual economic benefit in the form of increased sales. *Munden v. Harris, supra; Haith, supra; and Nemani, supra.* The appellate opinion

correctly refutes the trial court's ruling at p. 11 citing the Restatement Unfair Competitions. (A51).

Instructions D, E, F and G were erroneous under Missouri law, and it would have been error to give them. The trial court didn't say D, E, F and G were correct under Missouri law. It just said they were **more nearly** correct. It is not error to refuse an incorrect instruction.

B.

In its final judgment, the trial court asserted that Appellant must have shown an appropriation of the "commercial value" of his name in order to show advantage and that it should have instructed the jury to that effect. (Appendix at A17; LF 1402). The trial court's conclusion on this point directly contradicts Missouri law and was therefore error. The trial court used the Mo. App. E.D. decision in *Nemani v. St. Louis University, supra*, (A22-34) for guidance. Both *Haith* and *Nemani* (E.D. opinion) directly addressed this point and held that a plaintiff need not show an appropriation of the "commercial value" or for a "commercial purpose" but rather that a showing of **any** advantage to the defendants was sufficient. The court in *Haith* left no doubt that **any** advantage to the defendant would be sufficient for the jury to find liability for wrongful appropriation of name or likeness. *Haith*, 704 S.W.2d at 688. The court stated,

Defendant says that mention of plaintiffs' names in the grant application constituted an incidental business use and therefore was not a commercial appropriation. *** The argument ignores

that a jury could find that there was an *advantage* to defendant is
using plaintiffs' names to procure a government grant...

Id. (emphasis in original). It is important to note that the *Haith* court addressed the exact same argument raised by Respondents at trial, and the trial court correctly rejected it at trial. The trial court incorrectly accepted this argument only after the verdict. *Haith* specifically rejected that argument and found that the jury could find in favor of the plaintiffs if it found an advantage derived by the plaintiffs from the use. *Id.* The instructions given in this case comply with the law set forth in *Haith* and the E.D. opinion in *Nemani*. However, the testimony of Dr. Till and Mr. Arceneaux was that Respondent did gain a pecuniary benefit from the use of Appellant's name and identity. The trial court's conclusion is directly contradicted by Missouri law and should be reversed.

C.

In its final judgment, another reason the trial gave for granting a new trial was that there was no evidence of advantage to Respondents and therefore the disjunctive nature of the verdict director was in error. (A17; LF 1402). The trial court erred in relying on that as a basis for granting a new trial. The trial court reasoned that such a disjunctive submission, the verdict director allowed the jury to find in favor of the plaintiff if it found either an advantage to the defendants or a harm to the plaintiff, warranted a new trial **because there was no evidence** of an advantage to the defendants. As Appellant has set forth in the Statement of Facts and Summary of the Evidence, there was not only substantial, but voluminous evidence of an advantage derived by Respondents from their use of Appellant's name and identity. The

Appellate Court accepted the evidence of Dr. Till and Arceneaux as evidence that Respondents benefitted from the use of Twist's name when viewing the evidence in the light most favorable to the verdict. (A47). A disjunctive submission is not error when there is substantial evidence to support each portion of the submission. *Eaton v. Norfolk & Western Railway Company*, 936 S.W.2d 146, 153 (Mo. App. E.D. 1996). Therefore, the trial court erred as a matter of law in using the disjunctive as a basis for granting a new trial.

D.

Instruction No. 16 is MAI Instruction Number 4.01 and reads as follows:

Instruction Number 16

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a direct result of the defendants' use or publication of his name.

MAI 4.01

Submitted by Plaintiff

(A77; LF1266)

The trial court, in ruling on the motion for new trial, found that it misinstructed the jury on damages. (Appendix at A17; LF 1402). It appears the trial court was saying that it was incorrect to hold Respondents jointly and severally liable for the damages inflicted on Appellant, although the trial court did not directly so hold. The trial court's instruction given at trial was correct and its post trial order for new trial on this basis should be reversed. Under Missouri law, defendants to an action in tort are jointly and severally liable. "In all tort actions for damages, in which fault is not assessed to the plaintiff, the defendants shall be jointly and severally liable for the amount of the judgment rendered against such defendants." Section 537.067 RSMo. No fault was assessed to Plaintiff in this case. "It is clear, however, that Missouri's rule as to compensatory damages in tort actions is that '(a)ll who are guilty of

participating in the wrongdoing are jointly and severally liable for the **whole damage**, and the judgment **must be in one amount and against all** who are not discharged." *Linkogel v. Baker Protective Services, Inc.*, 626 S.W.2d 380, 386-387 (Mo. App. E.D. 1981) (emphasis added).

The evidence in this case shows that the inter workings of McFarlane and the corporate respondents comprised a singular enterprise that McFarlane controlled. He organized various corporate entities to carry out the work required to make the whole enterprise function, and as the, or an, owner, president or CEO of all of them utilized them to carry out his purpose of creating comics, manufacturing action toys, publishing, printing advertising and marketing Spawn and Spawn products. As shown, each entity played a role in knowingly utilizing Appellant's name and professional identity to promote and market Spawn and Spawn products.

Therefore, it does not matter when each Respondent participated in the wrongdoing, or even if they were in existence when part of the wrongdoing began, but rather that they did participate in the wrongdoing. The jury found that each Respondent participated in the wrongdoing against Appellant and each is jointly and severally liable to Appellant under Missouri law.

The court used M.A.I. 4.01 as the damage instruction. Missouri Approved Jury Instructions, 5th edition, at P14 of the pocket part supplement states:

This instruction is short, simple, and easily understood. Since no particular items of damage are set out, there is no risk of the jury

being improperly instructed on damages not supported by the record.

During the instruction conference, the parties and the court should discuss (on the record) just what damages are supported by the evidence and can properly be argued to the jury.

In this way, jury arguments can proceed without undue interruptions.

Near the end of the instruction conference, the trial court inquired of the attorneys:

THE COURT: Any motions regarding argument. Hearing none, we'll deal with the argument as it arises."

(T 1119)

During jury argument, there was no objections by Appellant's attorney or Respondents' attorney to either side's argument on damages. (T 1120-1179)

M.A.I. instructions are mandatory, if applicable. Rule 70.02(b). The damage instruction here is M.A.I. 4.01 and is applicable. The damages argument made to the jury were limited to the market value of the Appellant's name and identity and the diminution of that value by Respondent's use of Appellant's name and identity and no objections were made.

The court did not err in giving Instruction 16.

The trial court used the proper verdict form and properly rejected the verdict forms offered by Respondents. Where the defendants are joint tortfeasors M.A.I. 36.12 (used by the trial court) is the correct verdict form. See M.A.I. 36.12, (notes on use) paragraph 4 which

requires different amounts as to each defendant only where punitive damages will vary according to the degree of culpability or wealth of the respective defendants. The trial court incorrectly asserted that the verdict form should have allowed the jury to award separate compensatory damages against each Respondent based on the benefit each derived from the use of Appellant's name. However, under Missouri law Respondents are jointly and severally liable for their conduct because Appellant sustained one injury, Section 537.067 RSMo., and the trial court's verdict form was proper as a matter of law. Secondly, the measure of damages is what the respondents would have to pay for the use of Appellant's name and identity and the harm to Appellant from their use of his name and there was substantial expert testimony on that issue from Dr. Till and Mr. Arceneaux. Restatement (Third) Unfair Competitions § 49 CMT.d, cited in the slip opinion at A51.

The trial court erred in holding that the damages are to be based on the specific benefit derived by each defendant or the specific injury that each defendant inflicted on plaintiff's marketability. (A 18).

While, as set forth *supra*, Appellant submits the court of appeals slip opinion was incorrect as to the applicability of the First Amendment to this cause of action, the slip opinion was clearly correct in its holding as to the measure of damages. That slip opinion at page 11 (A 51) and correctly states:

In a right of publicity case, damages are measured by the fair market value the advertiser would have had to pay to use the person's identity in a commercial way and any dilutions of this

commercial value caused by excessive or harmful uses. See
Restatement (Third) Unfair Competitions § 49 cmt.d.”

The *Zacchini* court likewise held, saying:

“No social purpose is served by having the defendant get free
some aspect of the plaintiff that would have market value and for
which he would normally pay. *Kalnen, Privacy in Tort Law Were
Warren and Brandeis Wrong?* 31 Law and Contemp. Prob. 32b,
331 (1966).”

Zacchini, 433 U.S. at 576.

The trial court’s holding that the damages must be assessed as to each defendant according to the benefit derived by each defendant incorrectly treats this matter as if it were in quantum meruit, which it isn’t. It further ignores the uncontradicted testimony of Dr. Till who testified that whether the use of another’s name and identity actually increased sales of the product is simply not determinable. (T 249) It cannot be quantified (T 282), as there are a myriad of market factors that effect sales. (T 232).

Perhaps it is pertinent to observe the manner in which any company would have to go about securing the consent to use a person’s name and identity for their advantage in marketing a product. The company would obviously have to contact the prospective “endorser” to secure his permission, before using his name and identity. At that time, if the prospect were interested, there would be some negotiations as to compensation, and an agreement would have to be reached. Only then could the company lawfully use the name and identity for their

advantage. Whether, in actual fact, the company's belief that the use of the name and identity will benefit the company, turns out to be correct would depend upon future events. The compensation due the person would not depend upon whether, in fact, the company's choice turned out to be beneficial or not. It would have to be paid because the parties agreed on it, and that amount would obviously have taken into consideration the market value of the use of the persons name and identity.

In a right of publicity case, none of those negotiations and agreements precede the use of a plaintiff's name and identity for the advantage of the user – the defendant. And so it is completely understandable that the damages must be for the market value of the use of a plaintiff name and identity – the market value of that use – which may also include any devaluation to a plaintiff's marketability due to the use.

Appellant also notes that the court of appeals, unlike the trial court, viewed the evidence and testimony given by Appellant's experts Dr. Till and Mr. Arceneaux as credible and considered it in the light most favorable to the Appellant and the verdict. (Appellate opinion A47 and 49).

And, as noted above, the appellate opinion held the measure of damages was the fair market value the Respondents would have had to pay for the use of Appellant's name and identity, and any dilution of that marketability due to Respondent's harmful uses. (A51). It implicitly rejected the trial court's view that damages are to be assessed according to the specific benefit the Respondents' derived from their use of Appellant's name and identity.

Had Respondents chosen to do so, they could have filed Third Party Petitions against

each other seeking a determination of percentage of fault and secure contributions from each other. *Mo. Pacific Railroad v. Whitehead and Kales*, 566 S.W.2d.466 (Mo. banc 1978) and they can still do so. They chose not to do so and have no meritorious complaint.

E.

Finally, on the legal issues asserted by the trial court as the basis for a new trial, the trial court found that a new trial should be granted because it improperly admitted the testimony of Appellant's experts Dr. Till and Mr. Arceneaux. The trial court's conclusion is incorrect. The opinion testimony of Dr. Brian Till and Rocky Arceneaux was competent and properly admitted at trial. The trial court recognized the admissibility of Appellant's expert's testimony both before and during the trial, in saying that, they "qualified as experts." (LF 1403; Appendix at A18). It was only after the jury's verdict that it concluded that the testimony was inadmissible.

The trial court admitted in its judgment that Dr. Till and Arceneaux qualified as experts. (Appendix at A18; LF 1403). However, it held that their testimony should have been excluded because,

There was no evidence of any recognized market for product endorsements by hockey players, no evidence of any royalty previously attributed to the use of plaintiff's name in product endorsements, no evidence that the use of any hockey player's name in a work of fiction would have discernible effect on the market, and no evidence of any empirical studies showing that a

hockey player's endorsement would have any effect on the marketing of any product....

Id. The court based its determination, in part, in saying that the opinions lacked foundation under Section 490.065, RSMo. 1994. *Id.* Therefore, although the trial court admitted that Dr. Till and Arceneaux were experts in the subjects of their testimony, he determined, without any citation to authority, that the sources and bases for the expert's opinions made them inadmissible.

As noted above, the trial court found that both Dr. Till and Mr. Arceneaux qualified as experts. (Appendix at 18; LF 1403). As such, one might ask, what subject were they experts on? The answer is that, due to their education and experience in the discrete field of the use of athletes as product endorsers, they were experts on that subject, and that is what they testified about. The criticisms announced for the first time by the trial court in its judgment, all go to the credibility and weight the jury may give, or not give, to their testimony. And the judgment call as to their credibility is the exclusive province of the jury. *Waters v. Bankers Life Assurance Ass'n.*, *supra*, 50 S.W.2d 183, 188 (Mo. App. W.D. 1932); It is not for the court to determine. *Waters, supra*.

Nevertheless, we will address the court's criticisms.

The trial court asserted, "There was no evidence of any recognized market for product endorsements by hockey players." (Appendix at A18; LF 1403). The trial court was incorrect. The court acknowledged in its own final judgment that the evidence was that Twist obtained endorsement income during his professional career, and that appellant entered into

negotiations for an endorsement contract with EAS. (Appendix at A6; LF 1391). Respondent Todd McFarlane testified he knew athletes earned income from endorsement contracts. (McFarlane, Vol. 2, 169). Arceneaux testified to the endorsement market for athletes, and specifically with reference to appellant. (Arceneaux 26, 32-33). Dr. Till testified to the **market value** of the use of appellant's name. (T 136).

Finally, respondent's own witness, Michael Barnes, identified the big four sports as hockey, baseball, basketball and football. (T 947). He stated that when assessing the **market value** of a professional athlete, one does the same thing as to team athletes as with individual sports athletes. (T 952). Individual athletes are persons who compete in such sports as tennis or golf. (T 947). He identified Wayne Gretzky and Mark Messier, hockey players, as examples of hockey players who have a market value for endorsements. (T 964-965). No one objected to any of Appellant's or Respondents' expert testimony relating to market value on the grounds that there was no evidence of a "recognized market."

Here, as in other instances we have noted, *supra* and *infra*, the trial court's assertion as to what there was evidence of or not, is belied by the record. There was evidence of a recognized market for endorsements by hockey players.

The trial court asserted, "No evidence of any royalty attributed to the use of plaintiff's name in product endorsements" (Appendix at A18; LF 1403). The trial court was incorrect. As shown above, there was evidence that appellant was paid for product endorsements where he permitted his name to be used. If "royalty" means something other than being paid money to endorse a product, as compared with a percentage of revenue derived from the product, it

seems that such a distinction is without a difference. But, here, the evidence was that appellant, as one of only sixteen professional hockey players, did contract for his name to be used, at the request of the N.H.L.P.A., in a hockey comic book for which the N.H.L.P.A. would be paid 9% of the revenues. (T 149, 395).

Again, the court's statement has no evidentiary support and is refuted by the record.

The trial court asserted, "No evidence of the use of any hockey player's name in a work of fiction would have any discernable effect on the market." (Appendix at A18; LF 1403). The trial court was incorrect. There is no requirement in a wrongful appropriation of name or right of publicity case that a plaintiff prove the use of his name resulted in an actual beneficial effect upon the marketing of a product or increase in value. *Munden v. Harris, supra* at 1078; *Haith v. Model Cities, supra* at 687; the Appellate Court's opinion in *Nemani*. (Appendix at A27). The requirement under Missouri law is that the defendant used the name for its advantage, *Munden, supra*; *Haith, supra*; *Nemani, supra*.

In any event, Dr. Till testified that the use of appellant's name provided the Spawn franchise with additional economic value, and gave respondent's an economic advantage. (T 129, 136, 158, 272). Dr. Till also testified that the effect of an endorsement on the sale of the product is simply undeterminable. (T 243). Both Dr. Till and Mr. Arceneaux testified that there is a market value for the use of an athlete's name and identity. Respondents' expert, Michael Barnes, agreed. (T 956).

In addition, the evidence that a company contracted with the N.H.L.P.A. for the use of appellant's name, and fifteen other famous hockey players, in a fictional comic on hockey for

9% of revenue, evidenced that the use of an athlete's name – a hockey player's name – in a fictional work has value. (T 149-150). The jury, from the evidence in this case could have determined, as they did, that the use of Appellant's name gave Respondents an advantage.

The trial court asserted, "No evidence of any empirical studies showing that a hockey player's endorsement would have any effect on the marketing of any product." (Appendix at A18; LF 1403). We can find no case requiring that an expert do an empirical study in order to qualify as an expert and render opinions. Specifically, there is no requirement that a specific empirical study be done as to the specific use of a hockey player's name as an endorser, before a person, otherwise qualified as an expert in the field, can testify as an expert. The trial court's requirement of an empirical study to qualify a person as an expert is not required by Section 490.065 RSMo. And it seems obvious that such a requirement would render the use of a person, otherwise qualified as an expert, an economic impossibility for most parties, plaintiff or defendants, in most cases.

If the court's statement noted above means there ought to be evidence that an endorsement by an athlete would probably have an effect upon the market of a product, a requirement not currently required by Missouri law, under *Munden, supra* and *Haith, supra*, there is evidence of that here. It is obvious that companies believe athletic endorsers of their products help sell those products. We see it everyday, and the companies pay dearly for the athletes consent and endorsement.

Sean Phillips, Executive Vice President of EAS, testified he wanted appellant as an endorser of EAS products – athlete nutrition products, and saw a great opportunity for EAS to

have appellant as an endorser. (Phillips 7, 9, 16, 36). Dr. Till testified that the use of appellant's name provided an economic benefit to the Spawn franchise, and that the use by respondents of appellant's name early on in Spawn gave it momentum and attractiveness and "that is very important in the building of a franchise." (T 158). Appellant had an endorsement contract with Met-Rx. (T 170, 347). This evidence of athlete endorsers shows that companies use them believing they will benefit by their use..

Nevertheless, Dr. Till did do an empirical study entitled, "Celebrity Endorsers in Advertising, the case of Negative Celebrity Information," as part of his dissertation for his Ph.D., (T 140, 141), which dealt with the effect on the consumer of negative information about the endorser and its effect on marketing the product endorsed. (T 114, 115). That article was published in the Journal of Advertising, which is the premier academic journal in the advertising discipline. (T 115, 116). It received the "Best Paper Award" for 1998 (T 115). Although not specifically directed at hockey players, that paper addressed a celebrity endorser's effect on the sale of products.

It would require a reading of Dr. Till's testimony to fully appreciate the depth of his knowledge and experience in the matter he testified about. That is found on transcript pages 107-290.

In *Schreibman v. Zanetti*, 909 S.W.2d 692 (Mo. App. W.D. 1992), the court held that the fact that the expert witness had not previously valued a business such as the one in question, was not a determining factor in recognizing him as an expert. The court said, "It was a matter of the proper weight to be given the evidence, not an issue of its admissibility. The depth and

breadth of an expert's experience and knowledge are pertinent to the weight to be accorded their testimony, not to the admissibility of their opinions." *Id.* at 697.

We submit it would be most difficult, if not impossible, to find an expert witness on the effect and value of a celebrity's endorsement of a product, more knowledgeable and experienced than Dr. Till, or an athlete's agent more experienced and knowledgeable than Mr. Arceneaux.

The court erred in holding Dr. Till and Mr. Arceneaux should not have been permitted to testify.

The trial court, in its efforts to further disparage appellant's evidence, and particularly witnesses Till and Arceneaux said their testimony was "junk economics, and certainly not a science." (Appendix at A18; LF 1403). Their area of expertise is in the specific and unique business area of marketing products, and the use of athlete endorsers to further the marketing efforts of a company. The subject is extensively taught in universities all over the country and is not regarded as "junk economics". But the fact is that marketing Spawn and Spawn products is a business that has made multi-millions of dollars for Respondents. The trial judge may not be acquainted with product endorsement contracts, as few of us are, but Dr. Till and Mr. Arceneaux certainly are – it is their business – and athletes such as Marshall Faulk and other athletes represented by Arceneaux make a lot of money endorsing products. And Dr. Till, once in charge of marketing products for Ralston Purina, and now a professor in marketing at St. Louis University, knows what he is talking about on the subject of his testimony. The trial court said, "No rational person could believe that the use of Plaintiff's name as the *nom de*

guerre of a swarthy *mafioso* in a comic book series, having absolutely nothing to do with hockey either benefitted defendants or injured plaintiff in any way, except perhaps in plaintiff's imagination." (Appendix at A19; LF 1404).

Respondent's believed the use of NHL hockey players' names and identities benefitted the sale of their products. Why else would they have used NHL player names and then target hockey fans and kids in the promotions? Dr. Till and Mr. Arceneaux testified the use of appellant's name and identity was an economic advantage and the twelve ordinary people who served as jurors unanimously found respondents did derive an advantage from using appellant's name and identity, and that appellant was damaged thereby. They agreed with appellant's experts who reached that same conclusion which was rational and based on the evidence. As noted, *supra*, the Appellate Court accepted this evidence.

The evidence was sufficient for the jury to reach that conclusion, using their view of the credibility of the witnesses and evidence. The trial court's assessment of the credibility of the witnesses and evidence was contrary to the jury's verdict, but that is exactly what juries are for. The trial court was "out of bounds" when it substituted its opinion of the credible evidence for that of the jury.

"The trial judge is expected to defer to the expert's assessment of what data is reasonably reliable." *Wulfin v. Kansas City Southern Industries, Inc.*, 842 S.W.2d 133, 152 (Mo. App. W.D. 1992). "As a rule, questions as to the sources and bases of the expert's opinion affect the weight, rather than the admissibility, of the opinion, and are properly left to the jury." *Id.* Only where the "source upon which the expert relies for opinion is so slight as to be

fundamentally unsupported..." is the trial court to exclude the expert's opinion. *Id.* The evidence at trial showed that both Dr. Till and Arceneaux had more than sufficient foundation, by way of education, training and experience, to testify regarding the fact that Respondents derived an advantage from their use of Appellant's name and, separately, market value of the use of Appellant's name on the issue of damages.

Professor Brian Till holds an undergraduate degree in advertising from the University of Texas. He received his MBA in 1985 in marketing and accounting and his Ph.D. in marketing in 1993. (T 107-109). Dr. Till was product manager for Ralston Purina from 1985 through 1988 and in charge of marketing for certain brands. (T 107-109). He has published eight journal articles in marketing. (T 110). Each of Dr. Till's journal articles was subject to "peer review". (T 110-111). As part of the "peer review" process, Dr. Till's articles and research were reviewed and challenged by other experts in his field. (T 110-111). This process often takes up to a year and a half. (T 111). Peer reviewing is done to insure that the research and results are "strong and valid and accurate." (T 111).

His dissertation for his Ph.D. was entitled, "Celebrity Endorsers in Advertising, the Effect of Negative Celebrity Information." (T 113). Dr. Till tested the effect on a brand where the celebrity endorser had received negative publicity. (T 114). His dissertation showed that negative information about the endorser can have an effect on how people think, their attitude toward a product the endorser supported or endorsed. (T 114-115). It also determined that people's opinions regarding the product endorsed may effect their opinion of the endorser. (T 114-115). "The association of the endorser [here Appellant] with the negatively perceived

product [here Spawn] had a negative impact on people's attitude toward that endorser." (T 120). His study on this subject was published in the "Journal of Advertising," which is the premier academic journal in the advertising discipline. (T 115), and received the best paper award in 1998. (T 116).

Dr. Till was consulted by the manufacturers of Monostat and "I Can't Believe it's Butter" for his opinion regarding a choice of celebrity endorsers for their products. (T 122). He has received the outstanding instructor award in the School of Business at the University of Texas; Distinguished Professor Award at Drexell University in 1993 and 1994; Beta Gamma Sigma Outstanding Teacher Award at St. Louis University in 1997, and in 1998 he received the Outstanding Teacher Award from the Society for Marketing Advances. (T 124). He has, since 1995, been a professor of marketing at St. Louis University, primarily teaching marketing management and advertising management in the School of Business, and teaches undergraduate, Masters and Ph.D. students. (T 123). He reviewed issues of Spawn, Curse of Spawn, Violator, the first six episodes of the HBO animated series, a number of internal documents of Respondents; HBO's "Real Sports" segment featuring Appellant; a number of articles and write ups featuring Appellant's work with children and charities, and two contracts with other professional athletes. (T 128). He formed four opinions relying upon his training, education, experience, knowledge in the marketing and advertising field, and his review of the materials in this case. (T 128, 129).

Arceneaux has represented athletes for 13 years. (Arceneaux 8-10). Arceneaux has negotiated shoe, trading card, book, apparel and television promotional contracts for his

clients. (Arceneaux 11). Arceneaux has represented numerous athletes including Marshall Faulk and Eric Dickerson. (Arceneaux 10, 13, and 15). Arceneaux is fully aware of the market value for use of an athlete's name through his experience and training and based his opinion on such. (Arceneaux 14-16). Arceneaux was also aware of what athletes would accept to endorse products. (Arceneaux 28-30, 33). In addition, Arceneaux is part of a network of athlete representatives who share information regarding market value for endorsements. (Arceneaux 28-30). Finally, he was aware of the potential negative impact a product can have on the endorser. (Arceneaux 42-43).

It is apparent from the evidence, that both Dr. Till and Arceneaux had specific knowledge, training and experience in determining the advantage derived by companies from using athlete's names and the value of such uses. It was error for the trial court to hold, as it did, that the expert's knowledge and experience must be specific to the narrow category of hockey players used in comic books in order to testify as an expert. That an expert in a field has not previously valued a specific kind of business is not grounds to exclude the expert's testimony. *Schreibman v. Zanetti*, 909 S.W.2d 692, 697 (Mo. App. W.D. 1995). "The depth and the breadth of the expert's experience and knowledge are pertinent to the weight to be accorded their testimony, not to the admissibility of their opinion." *Id.* Both Dr. Till and Arceneaux have substantial experience, training and have studied athlete endorsement of products. They then applied that knowledge to the facts of this case and rendered their opinions. Those opinions were properly admitted by the trial court prior to the jury's verdict and the trial court's later decision to exclude the testimony should be reversed.

The court, in its "Order and Judgment" held it erred in admitting the testimony of Dr. Brian Till **on the issue of damages**. (Appendix at A21; LF 1406)(emphasis added). It stated it should have sustained respondent's motions in limine to exclude the evidence of Dr. Till, and should have sustained respondent's timely renewed objections at trial. (Appendix at A18; LF 1403).

While it is correct that prior to trial, on June 16, 2000, the court denied respondents pre-trial motions in limine, to exclude the testimony of Dr. Till in its entirety, there were no objections at trial made to Dr. Till testifying. He testified in person beginning at transcript page 107 and going through page 290. The record shows that there were no objections made at the beginning of his testimony, nor was there any renewal of earlier filed motions in limine, either prior to Dr. Till's testimony, nor prior to, or at the time, he testified that the use of appellant's name provided commercial monetary value to all Spawn products, (T 129); and that the fair market value of the use of appellant's name was 15% of the revenues of Spawn products in which his name was used. (T 130). It was only after Dr. Till had testified for 36 pages of testimony, and almost as an aside, when the court was considering an objection to the use of a document, that the following occurred:

THE COURT: I will.

MR. MARTINEAU: Your Honor, I would also reiterate that, you know, even though I haven't stated them all, we reassert all the objections we made in the motion in limine that we filed with

respect to this particular witness, as to the admissibility of all his testimony.

MR. AKERS: So do we, Your Honor.

THE COURT: Okay.

(The following proceedings resumed within the presence and hearing of the jury):

(T 143).

There was no specific objection made at trial.

Dr. Till's testimony proceeded through the rest of the direct and redirect examinations, during which he further testified as to his expert opinions and was cross examined extensively on them. His testimony concluded at transcript page 290.

At no time did respondents make any objections as to Dr. Till's qualification as an expert, or that he lacked foundation sufficient to render expert opinions on the issues he testified about. (T 107-290).

In short, there were no objections at trial to the qualifications of Dr. Till to give expert opinions, nor to any of the opinions he gave. And the trial court was just incorrect in saying there were timely objections to his expert testimony at trial. His testimony came in with no specific objections being made, and therefore there was no error committed in the admission of his testimony. It simply was not preserved by respondents for consideration by the trial court on post trial motions, and therefore the trial court erred in holding it erred in admitting that testimony. In *M.C. v. Yeargin*, 11 S.W.3d 604 (Mo. App. E.D. 1999), the court held:

There must be an objection to preserve evidentiary questions for appeal. At the time the evidence is being presented at trial, there must be an objection stating specific grounds upon which the trial judge may base a ruling.

M.C. v. Yeargin, 11 S.W.3d at 617-618. (Citation omitted).

In *Ball v. American Greetings Corp.*, 752 S.W.2d 814, 823, 824 [9] (Mo. App. W.D. 1988) the court held that a motion in limine does not preserve the objection. *See also, Derossett v. Alton & Southern Railway Co.*, 850 S.W.2d 109, 111 [1] (Mo. App. E.D. 1995). To the same effect is *Derossett v. Alton & Southern Railway Co.*, 850 S.W.2d 109, 111 [1] (Mo. App. E.D. 1995), holding denial of a motion in limine preserved nothing for review, and that, "a specific objection must be made at the time the evidence discussed in the motion in limine is introduced at trial." *Id.* at 111 [1].

In the instant case no specific objections were made at trial for the trial court to rule on, and therefore objections to the testimony were waived.

Nor did respondents make any timely motions to strike the testimony of either Dr. Till or Arceneaux. Such motions made after the witness is excused are untimely. *Kunce v. Green*, 671 S.W.2d 23, at 24-25 (Mo. App. S.D. 1984). In the instant case, no motions to strike were made to either Till or Arceneaux testimony before they were excused or as to Arceneaux, before the end of his deposition testimony. (T 290, 515).

In the instant case there were no specific, or even general, objections made to the qualification of Dr. Till to give expert opinions or to the opinions he gave, at trial.

Although appellant submits, as shown *infra*, that Dr. Till is fully qualified to give expert opinions, yet had respondents made specific objections at trial, appellant would have had the opportunity to satisfy those objections so that his expert testimony would be admissible. But here, all the testimony of Dr. Till went in, with **no** specific objections, and therefore was legitimately considered by the jury.

While the primary purpose of objections is to prevent inadmissible evidence from being admitted, it, as we all know, functions so as to put the offering party on notice of the opponent's perceived viewpoint, and allows the offering party the opportunity to satisfy the perceived defect. This is of particular importance as to expert witnesses. But, as here, when no objection is made, there is nothing for the court to rule on, and the offering party has no opportunity to satisfy the substance of the objections, whether it be to the qualifications of the expert, or other grounds, because they were simply not made.

In this case, no specific objections were made at trial, no timely motions to strike were made and so the trial court had nothing to rule on, and the issue was waived and not preserved for review by the trial court on post trial motions, nor by a court on appeal.

The trial court's erroneous conclusions with respect to sections (A.) through (E.) above are all questions of law. As noted above, the trial court is afforded no deference with respect to questions of law. *Rodman v. Schrimpf*, 18 S.W.3d 570, 573-574 (Mo. App. W.D. 2000).

The judgment should be reversed.

F.

Finally, the trial court concluded that the verdict was against the weight of the evidence, (Appendix at A19; LF 1404), saying no rational person could conclude from the evidence that either Respondents benefitted from their use of Appellant's name or that Appellant was injured in "any way, except perhaps in [his] imagination." and then saying, that therefore, "Plaintiff's case must fail" (A at 19). The Court gave as the ground for granting a new trial as against the weight of the evidence, that Appellant failed to make a submissible case.

Ordinarily a Trial Court's Order granting a new trial on the basis that the verdict was against the weight of the evidence, a discretionary ground, will be affirmed **in the absence of an abuse of discretion, or when the Trial Court states a specific ground for that Order.**

When the Order granting a new trial states the verdict is against the weight of the evidence, but then states a specific ground, the Order is not discretionary, and if the specific grounds are incorrect, the new trial ordered will be reversed. *Lifritz v. Sears Roebuck & Co.*, 472 S.W.2d 28, 32 - 33 (Mo. App. E.D. 1971). In *Lifritz* the trial court granted a new trial saying the verdict was against the weight of evidence "on grounds A, H, and I of said motion". *Id.* at 32. The *Lifritz* opinion held the trial courts grant of a new trial "as against the weight of the evidence" was "in essence that Plaintiff failed to make a submissible case". *Lifritz* at 33. That, the court held, was not a discretionary ground.

Here as in *Lifritz*, the reasons given by the trial court for granting a new trial as against the weight of evidence, were that Appellant failed to make a submissible case. (JNOV at A 19). When the trial court said "no rational person could believe...", it is simply saying that the Judge did not believe the evidence and Appellant did not make a submissible case, and that is not an

acceptable basis upon which to rule the verdict was against the weight of the evidence. In giving the legal basis for the ruling the court did not make a discretionary judgment, but went beyond it and gave specific grounds - failed to make a case - and that is not a discretionary ruling. *Lifritz* at 33. "If Appellant makes a submissible case, an order granting a new trial *** for the reason that Plaintiff failed to make a submissible case, would be arbitrary and an abuse of the court's discretion". *Lifritz* at 33.

In *Guzman v. Hanson*, 988 S.W.2d 550, 554 (Mo. App. E.D. 1999), the court defined an abuse of judicial discretion as follows:

An abuse of judicial discretion occurs when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration...

At this juncture, we ask the court to look at the trial judge's JNOV Order, beginning at Appendix A-1, and consider it in the light of the repetitive incorrect statements of the evidence that the trial court utilized as the basis for its JNOV and new trial orders. Appellant has set all that out in Appellant's Brief. The repetitive distortions and misstatements of the evidence by the trial court indicate "a lack of careful consideration" to what the evidence was, and is so against the logic of the circumstances, that it is truly arbitrary and unreasonable. In short, the trial court misstated important facts in evidence and then based its rulings on the misstatements. Surely, that ought to shock the conscience of this court. Also we ask the Court to review the trial court's opinion as to the law relating to this case as found in its JNOV Order,

(Appendix A1-21), in the light of the established Missouri law found in *Munden v. Harris*; *Haith v. Model Cities Health Corp.*, *supra*; *Nemani v. St. Louis University*, Appendix A.22.

With respect to the trial court's erroneous redefinition of Missouri law applicable to this case, we have shown that the trial court did misstate and misapply the law.

The court should reverse the grant of a new trial and reinstate the verdict.

III.

THE COURT ERRED IN DENYING APPELLANT AN INJUNCTION AGAINST THE FURTHER USE OF HIS NAME BY RESPONDENTS IN THAT (1) APPELLANT HAD AN ADEQUATE REMEDY AT LAW; (2) THAT THE U.S. CONSTITUTION AMENDMENT 1 PROHIBITED AN INJUNCTION; AND (3) THAT AN INJUNCTION WOULD CONSTITUTE PRIOR RESTRAINT, BECAUSE, THE REMEDY AT LAW FOR DAMAGES RESULTING FROM RESPONDENTS' PAST CONDUCT IS INADEQUATE TO PREVENT REPETITIVE AND CONTINUING DAMAGE BY RESPONDENTS' USE OF APPELLANT'S NAME; THE U.S. CONSTITUTION DOES NOT PROHIBIT AN INJUNCTION, AND, AN INJUNCTION WOULD NOT CONSTITUTE UNCONSTITUTIONAL PRIOR RESTRAINT BECAUSE THE JURY FOUND THE USE OF APPELLANT'S NAME WAS UNLAWFUL.

After the jury's verdict, the parties briefed the injunction aspect of this case and argued that claim at that same time Respondents' post trial motions were argued. (T 1186-1263). The court denied an injunction, (A7-13; LF 1392-1398) which was sought by Count VI.

Appellant appealed the denial of an injunction to restrain continued unlawful conduct of respondents.

Appellant recognizes that after the court held that Appellant failed to make a submissible case and entered JNOV, there was, at that time, no legal basis upon which the trial court could issue an injunction, as the court held Respondent's conduct was lawful. Further, if this court affirms the JNOV, then, again, there would be no legal basis for an injunction.

However, should this court reverse the JNOV and reinstate the verdict, the legal effect would be that the Respondent's conduct was, and if continuing, is unlawful and an injunction would be legally authorized.

Appellant requests that if this court reverses the JNOV, and reinstates the verdict, that this court remand the injunction count to a different judge on the St. Louis Circuit Court for consideration of an injunction. Or, if this court reverses the JNOV and remands for a new trial on the right of publicity claim, that the court also remand the injunction count for consideration by the trial court after the new trial is had and if the jury again finds in favor of Appellant.

We will briefly address the rulings the trial court made in denying an injunction.

The trial court redecided issues that had been submitted to and found by the jury in its verdict, on the erroneous view that the fact issues regarding Respondent's unlawful conduct was for the court and not the jury, citing *Mo-Kan Teamsters Health & Welfare Fund v. Clark*, 803 S.W.2d 61 (Mo. App. W.D. 1990) (A7; LF 1392). In *Mo-Kan*, the jury was purely an advisory

jury. Here the jury was a regular judgment jury and the factual determination by the instant jury cannot be redecided by the court. *Mo-Kan* at 803 S.W.2d at 53 distinguished advisory juries from regular juries saying of regular juries saying:

In that function, the trial court does not find facts.

Id. at 53.

A final verdict by a regular jury is binding on the trial court on the facts submitted when it takes up the remaining issues of an equitable nature – the injunction. *Fidelity & Casualty Co. of New York v. Western Casualty & Surety Co.*, 337 S.W.2d 566, 573-574 (Mo. App. E.D. 1960); *State Farm Mutual Auto Ins. Co. v. Johnson*, 586 S.W.2D 47 (Mo. App. E.D. 1979).

Fidelity & Casualty, supra, was a declaratory judgment suit in which the factual issues was, "who was driving the car." A jury called upon to determine that issue, which was not an advisory jury, decided the issue by their verdict. The court held the trial court "had no choice but to accept the jury's verdict, provided there was a submissible case made ***" *Id.* at 573-574.

After it is judicially determined that unlawful conduct is continuing, it can be enjoined and that is not prior restraint. The injunction may be necessary for complete relief. *Wolfe v. Harris*, 184 S.W 1139, 1142 (Mo. 1916); *Flint v. Hutchison, Smoke & Burner Co.*, 19 S.W. 804, 806-807 (Mo. 1892); *Munden v. Harris, supra* at 1076; *Haith, supra*, at 687; *Pienny v. Berry*, 61 Mo. 359 (1875); *Pittsburgh Press v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376 (1973); see Section 526.030 RSMo.

If this court reverses the JNOV and reinstates the verdict, Appellant requests the court to remand the injunction issue to a different judge of the St. Louis Circuit Court for consideration of the equitable issues and determination as to whether the continuing unlawful conduct should be enjoined, or if this Court orders a new trial, Appellant requests the court to remand the injunction count also.

Whether or not an injunction would be equitably appropriate on remand will depend upon whether the trial court finds the unlawful conduct to be continuing or repetition is threatened, and an injunction is necessary for complete relief. The injunction, if issued, would, of course, have to be narrowly tailored to fit the continuing unlawful conduct.

CONCLUSION AND RELIEF SOUGHT

For the reasons set forth above, Appellant respectfully requests that the Court reverse the trial court's judgment notwithstanding the verdict and granting of a new trial, reinstate the jury's verdict and remand to a different judge to decide the equitable issues on the injunctive count.

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The undersigned hereby certifies that two copies of the Appellant's Substitute Brief and Appendix thereto will be hand delivered this 18th day of December, 2002, addressed to the following:

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I hereby certify that the foregoing Substitute Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

- (A) It contains 30,193 words, as calculated by counsel's word processing program;
- (B) A copy of this Brief is on the attached 3 1/2" disk; and that
- (C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.
